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Supreme Court, U.S.
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No. 04-989

In the

SUPREME COURT OF THE UNITED STATES

Sarah Jenkins Horton et al.,
Petitioners

v.

Bank One, N.A. et al.,
Respondents

On Petition for Writ of Certiorari
to the
United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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Introductory Statement:

Sarah Horton filed an action against "Bank One, N.A." and its various subsidiaries in state court in Bastrop, Texas alleging violations of federal and state consumer protection provisions and common law claims of fraud and theft stemming from a consumer car loan. Bank One answered the suit and counter claimed for collection on the loan. Bank One then removed the matter to the Federal Court for the Western District of Texas, Austin on the basis of diversity of citizenship. Horton moved to remand the matter to state court arguing that the District Court did not have diversity jurisdiction because 28 U.S.C. 1348 establishes that national banks are "citizens" of the states in which they operate branch offices. The District Court denied the motion to remand but certified that matter as appropriate for an interlocutory appeal. The Fifth Circuit agreed to hear the matter on an interlocutory basis. In an opinion filed October 5, 2004 the Fifth Circuit determined that 28 U.S.C. 1348 did *not* establish that national banks were "citizens" of the states in which they operate branches following the reasoning in the only other circuit opinion then to have addressed the issue, *First Star v. Faul,* 253 F.3d 982 (7th Cir. 2001). On November 1, 2004 the Fourth Circuit reached the opposite conclusion in *Wachovia v. Schmidt*, 388 F.3d 414 (4th Cir. 2004) an opinion which rejected the reasoning of both *First Star* and *Horton.* The Fourth Circuit found that 28 U.S.C. 1348 *does* establish that national banks are citizens of the states in which they operate branch offices.

Question Presented for Review:

Does 28 U.S.C. 1348 establish that national banks are citizens of the states in which they operate branch offices, thereby precluding diversity jurisdiction?

List of Parties to Proceeding:

Sarah Horton and George L. Matassarin
Plaintiffs /Counter-Defendants/Petitioners

Bank One, N.A.; Bank One Corporation and
Bank One Wisconsin
Defendants/Counter-Plaintiffs /Respondents

In or around January, 2004 the Defendants were purchased by or merged with JPMorganChase.

Counsel:

The Petitioners are represented by: Patricia J. Matassarin
San Antonio, Texas

The Respondents are represented by: Mr. Bradley J. Johnson
JPMorganChase
In-house counsel
Dallas, Texas

The Office of the Comptroller of the Currency, Washington, D.C. was an amicus on behalf of the banking industry in the underlying appeal.

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Federal Statute as issue:

28 U.S.C. 1348 1

Opinion Below:

On October 5, 2004 the Fifth Circuit Court of Appeals filed an opinion in *Horton v. Bank One, N.A.*, 387 F.3d 426 (5th Cir. 2004) which found diversity jurisdiction was available to national banking associations to the same extent that it was available to corporations and state banks. The opinion rejected the contention that the legislative history behind 28 U.S.C. 1348 established Congressional intent to restrict rather than expand the diversity jurisdiction of federal courts and/or that Congress specifically intended to place national banks in jurisdictional parity with the state banks in the state of those banks' charter.

Jurisdictional Basis:

Appellate Jurisdiction in the United States Supreme Court is conferred by virtue of 28 U.S.C. 1254. Jurisdiction in the lower United States District Court for the Western District of Texas, Austin is disputed by Petitioners but was found by the Fifth Circuit to have been conferred by the U.S. Supreme Court by analogy to jurisdiction afforded corporations and state banks.

Applicable Statute: 28 U.S.C. 1348

> **The district courts shall have original jurisdiction of any civil action commenced by the United States, or by direction of any officer thereof, against any national banking association, any civil action to wind up the affairs of any such association, and any action by a banking association established in the district for which the court is held, under chapter 2 of Title 12, to**

enjoin the Comptroller of the currency, or any receiver acting under his direction, as provided by such chapter.

All national banking associations shall, for the purposes of all other actions by or against them, be deemed citizens of the States in which they are respectively located.

Statement of the Case:

The facts underlying this dispute involve a trail installment contract for the purchase of a vehicle by Horton. In 2002, Horton filed suit against Bank one in Texas state court alleging violations of several consumer-protection-type statutes and asserting common-law claims. In February 2003, Bank One solicited a settlement offer from Horton. Bank One contends that the settlement offer gave notice to them, for the first time, that the amount in controversy exceeded $75,000. The offer reached the amount in controversy threshold because it also included attorney's fees. Bank One then removed the matter to Federal District Court for the Western District of Texas in Austin, Texas. Horton moved to remand arguing that there was no federal jurisdiction because complete diversity of citizenship was lacking. Horton relied on the "majority" view of District Courts that because bank One had branches in Texas, it was "located" in Texas and was thus a citizen of Texas pursuant to 28 U.S.C. 1348; that Texas law mandated that Bank One's collection action be brought in the county of Horton's residence; and that Texas law established that banking associations conducting banking business in Texas were deemed "domiciled" in Texas. After rejecting Horton's

reasoning and denying Horton's motion to remand, the District Court granted her motion to certify the matter for interlocutory appeal and the Fifth Circuit granted leave to appeal. The Office of the Comptroller of the Currency, Washington, D.C. appeared as an amicus on behalf of Bank One, N.A.

On October 5, 2004 the Fifth Circuit filed an opinion which followed the reasoning of *Firstar v. Faul,* 253 F.3d 982 (7th Cir. 2001) finding national banking associations were to have the same jurisdictional prerogatives as corporations and state banks operating outside of their charter states which affirmed the ruling of the District Court. However, on November 1, 2004 the Fourth Circuit Court of Appeals in *Wachovia Bank, National Association v. Schmidt III*, 388 F.3d 414 (4th Cir. 2004). found the opposite, opining the 28 U.S.C. 1348 establishes that national banking associations are deemed citizens of the states in which they operate branch offices. If the Fourth Circuit is correct, then no diversity exists between national banks and the citizens of states in which they operate, thusly destroying "diversity jurisdiction". That being so, then a judgment rendered in federal court would be void for lack of subject matter jurisdiction.

Considerations Governing Review:

There now exists a conflict of opinion between the Circuit Courts concerning the most fundamental question in jurisprudence, that of subject matter jurisdiction. This Court should resolve the conflict

Arguments and Authorities:

Bank One, N.A. and the OCC filed briefs which emphasized that the intent of Congress should control in determining just what was intended with the use of the word "located" in 28 U.S.C. 1348. The OCC had also appeared as an amicus on behalf of Firstar Bank in that Seventh Circuit case. *Firstar,* however, did not address the Congressional record advanced by Horton which clearly indicated that the intent of Congress in limiting the access to federal courts by national banking associations in the legislation which ultimately became 28 U.S.C. 1348, was to create jurisdictional parity with the state banks operating along side those national banks in the state of those state banks' charter. I.E., " . . . that a national bank doing business within a certain state shall be subject for all purposes of jurisdiction to precisely the same regulations to which a State bank, if organized there, would be subject." (See Appendix, pg. 11a) A state bank organized in Texas would be a Texas citizen and could not assert diversity jurisdiction in this instance. Thus, a national bank "located" in Texas should be deemed a Texas citizen and likewise cannot assert diversity jurisdiction against a Texas citizen.

Both *Firstar* and *Horton* found the specific intent referenced above insignificant in the face of case law they assert mandates jurisdictional parity for national banking associations with state banks operating outside their charter states (interstate) and corporations. This position effectively destroys any parity with state banks operating inside their charter states. Texas state banks must stand and defend consumer protection actions and prosecute their collection

actions in the counties of the debtor's residence, before state judges subject to reelection in those counties, whereas, the few out of state banks operating in Texas and national banking associations may remove their cases to far away federal tribunals. Defending collection actions in metropolitan areas miles and miles from the debtor's residence makes prosecuting or defending actions involving a national banking association difficult and remote for most consumers. They are forced to expend the resources necessary to litigate in federal court -- which are generally more costly than state court litigation in the counties of their residences.

Both *Firstar* and *Horton* expand federal court diversity jurisdiction contrary to Supreme Court precedent. They contend that jurisdictional parity with corporations is mandated. That finding, however, is contrary to *Carden et al., v. Arkoma Associates,* 494 U.S. 185, 110 S.Ct. 1015, 108 L.Ed.2d 157 (1990). The Court stated: " . . . While the rule regarding the treatment of corporations as 'citizens' has become firmly established, we have . . . just as firmly resisted extending that treatment to other entities". Id. at 189. The Carden Court made it clear that diversity jurisdiction was not to be expanded for other "artificial entities" as had been done for corporations. The opinion establishes that diversity jurisdiction may not be expanded by implication or by analogy. Yet, *Firstar* and *Horton* have done just that -- expanded federal diversity jurisdiction by arguing that legislative action and inaction, analyzed by case law, "imply" that national banking associations (artificial entities) must be afforded the same jurisdictional prerogatives as the first artificial entity to be afforded diversity jurisdiction, corporations.

Wachovia, after analyzing arguments advanced in *Firstar*, and *Horton* has brought the issue full circle by weighing in favor of the statutory construction analysis of the case establishing the District Court majority view (prior to the Seventh Circuit's *Firstar*), *Connecticut Nat'l Bank v. Iacono*, 785 F.Supp. 30 (D.R.I. 1992). The thrust of the analysis is that 28 U.S.C. 1348 uses two separate terms to refer to a site, "established" and "located". Common sense or common usage of "established" denotes a site of creation or conception whereas "location" denotes physical presence. Thus, the express statement of 1348 which states that national banking associations are to be deemed citizens of the place of their "locations" restricts diversity, rather than expands it. *Wachovia* and *Carden* are in accord with one another and are in accord with the legislative intent statement advanced in *Horton*. This position protects the individual consumer interests at stake; accommodates federalism concerns; and restricts the plethora of collection cases that are encouraged to be brought in federal courts by *Firstar* and *Horton*. Amount in controversy is easily established with even the most minimal installment contract because attorney fees (federal litigator fees) are included in the amount total. All national banking associations have to do to run up the fees is to give consumers' counsel the run- a- round for a short period and fees bring the amount in controversy up to the total required in short order.

WHEREFORE, by reason of the above and foregoing Petitioners respectfully pray that this Honorable Court will grant certiorari to resolve the important issue presented.

RESPECTFULLY SUBMITTED:

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United States Court of Appeals
Fifth Circuit
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Clerk

In the United State Court of Appeals
For the Fifth Circuit

No. 03-50865

SARAH JENKINS HORTON;
GEORGE LEON MATASSARIN,
Plaintiffs-Counter
Defendants-Appellants,

versus

BANK ONE, N.A.;
Defendant-Counter Claimant-Appellee,
BANK ONE CORPORATION;
BANK ONE WISCONSIN,
Defendants-Appellees.

Appeal from the United States District Court
for the Western district of Texas

Before GARWOOD, HIGGINBOTHAM, and SMITH,
Circuit Judges.

PATRICK E. HIGGINBOTHAM, CIRCUIT JUDGE:

Sarah Jenkins Horton appeals the district court's rejection of her contention that for purposes of its diversity jurisdiction, a national bank is a citizen of each and every state in which it has a branch. We affirm.

I

The facts underlying this dispute involve a retail installment contract for the purchase of a vehicle by Horton. In 2002, Horton filed suit against Bank One in Texas state court alleging violations of several consumer-protection-type statues and asserting several common-law claims. IN February, 2003, Horton sent a settlement offer to Bank One. This offer put Bank One on notice for the first time that the amount in controversy exceeded $75,000. Bank One immediately removed the case to federal district court. Horton moved to remand arguing that there was no federal jurisdiction because complete diversity of citizenship was lacking. Horton reasoned that, because Bank One had branches in Texas, it was "located" in Texas and was thus a citizen of Texas. After rejecting Horton's reasoning and denying Horton's motion to remand, the district court granted her motion to certify the order for interlocutory appeal and we granted leave to appeal. The specific issue certified for this appeal is whether national banking associations are citizens of every state in which they have a branch.

II

We have jurisdiction[1] and we review *de novo* the district court's finding of jurisdiction.[2]

28 U.S.C. [section] 1348 provides that for purposes of diversity jurisdiction, "[a]ll national banking associations shall . . . be deemed citizens of the State in which they are respectively located." We must decide the meaning of "located." Horton argues that Bank One is a citizen [of] Texas because it has branches in Texas, while Bank One claims that it is a citizen only of Illinois - the state of its principal place of business and the state listed in its organization certificate.

Until recently no circuit had addressed the meaning of "located" in section 1348. Prior to 1992, the "unquestioned" and "longstanding interpretaion" was that "located" did *not* include the branches of a national bank.[3]

From 1992 to 2001, the majority of district courts that addressed this issue concluded that under section 1348, a branch,[4] led by the District of Rhode Island's opinion in

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[1]See 28 U.S.C. [section] 1292(b). .

[2] *Union Planters Bank Nat'l Ass'n v. Salih*, 369 F.3d 457,460 (5th Cir. 2004).

[3] *Baker v. First Am. Nat'l Bank*, 111 F.Supp.2d 799,800 (W.D. La. 2000); see also *Fin. Software Sys. v. First Union Nat'l Bank*, 84 F.Supp.2d 594,602 (E.D. Pa. 1999)

[4] *Firstar Bank, N.A. v. Faul*, 253 F.3d 982,985(7th Cir. 2001)

Connecticut National Bank v. Iacono.[5] Pointing to a Supreme Court case in 1977 and changes in the law involving national banks, the court in *Iacono* decided to reexamine the meaning of "located," even though a 1943 case "appear[ed] to have settled the matter."[6] A minority of district courts, however, remained unpersuaded by *Iacono's* analysis and conclusion.[7]

In 2001, the Seventh Circuit in *Firstar* held that "for purposes of 28 U.SC. [section] 1348 a national bank is 'located' in, and thus a citizen of, the state of its principal place of business and the state listed in its organization certificate."[8] *Firstar* analyzed the text history, and purpose of section 1348 and its predecessors. While no other circuit has yet ruled on this issue, every district court that has since confronted it has agreed with *Firstar*.[9]

III

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[5]785 F.Supp. 30 (D.R.I. 1992)

[6]Id. at 31-32

[7]See, e.g., *Fin. Software Sys.,* 84 F.Supp.2d at 602-07; *Baker,* 111 F.Supp.2d at 800-01.

[8] *Firstar,* 253 F.3d at 994.

[9]See. e.g., *Adams v. Bank of Am., N.A.,* 317 F.Supp.2d 935, 941-42 (S.D. Iowa 2004); *Evergreen Forest Prods. of Ga., LLC v. Bank of Am., N.A.*, 262 F.Supp.2dd 1297, 1307 (M.D. Ala. 2003); *Bank One, N.A. v. Euro-Alamo Invs., Inc.*, 211 F.Supp.2d 808-810 (N.D. Tex. 2002) (agreeing with "well-reasoned *Firstar* Bank-line" of cases.)

We follow *Firstar's* holding that a national bank is not "located" in, and thus not a citizen of, every state in which it has a branch.

A

In construing another provision containing "located," the Supreme Court recognized that " [t]here is no enduring rigidity about the word 'located.'"[10] The language of section 1348 is therefore ambiguous, and this court "will look to legislative history to clarify the purpose" of the statute.[11]

"When . . . juridical interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statue indicates, as a general matter, the intent to incorporate its . . . judicial interpretations as well."[12] Further, "courts presume that Congress will use clear language if it intends to alter an established understanding about what a law means; if Congress fails to do so, courts presume that the new statute has the same effect as the older version."[13]

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[10]*Citizens & S. Nat'l Bank v. Bougas*, 98 S.Ct. 88,93 (1977)
[11]*United Servs. Auto. Ass'n v. Perry,* 102 F.3d 144,149 (5th Cir. 1996) (per curiam).
[12]*Bragdon v. Abbott,* 118 S.Ct. 2196, 2208 (1998)
[13]*Firstar,* 253 F.3d at 988 (citing *Cotton Sav. Ass'n v. Comm'r*, 111 S.Ct. 1503, 1508-09 (1991) (stating that by leaving a statute "undisturbed through subsequent reenactments of the [Act}," the Court "may presume that Congress intended to codify [the related] principles" represented by the Court's contemporary decisions)).

B

Firstar found that the history of section 1348 and its predecessors makes plain Congress's intent to grant national banks and state banks and corporations equal access to diversity jurisdiction.[14] When national banks were first created in 1863, federal courts had jurisdiction over any suit involving a national bank.[15] In 1864, Congress added that any such case could also be brought in state court.[16]

In 1882, However, Congress trimmed federal jurisdiction over cases involving national banks:

> [T]he jurisdiction for suits hereafter brought by or against any association established under any law providing for national-banking associations, except suits between them and the United States , or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States which do nor might do banking business where such national-banking associations may be doing business when such suits may be begun . . . .[17]

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[14] *Firstar,* 253 F.3d at 988.

[15] Id. at 986 (citing *Petri v. Commercial Nat'l Bank of Chicago,* 12 S.Ct. 325,326 (1892)

[16] *Petri,* 12 S.Ct. at 326.

[17] Act of July 12, 1882, ch. 290, [sectionn] 4, 22 Stat. 162, 163 (emphasis added.).

The apparent purpose of the 1882 statute was to "eliminate automatic federal question jurisdiction over all cases involving national banks."[18] In 1887, Congress superseded the 1882 Act and first used the phrase that appears today in section 1349. The 1887 Act proclaimed:

> [A]ll national banking associations established under the laws of the United States shall, for the purposes of all actions by or against them, real, personal, or mixed, and all suits in equity, *be deemed citizens of the States in which they are respectively located;* and in such cases the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same State.[19]

The Supreme Court has concluded that the objective of the 1882 and 1887 Acts was to create jurisdictional parity between national banks on the one hand and state banks and corporations on the other. Interpreting the 1882 Act, the Supreme Court observed that it "was evidently intended to put national banks on the *same footing as the banks of the state* where they were located for all the purposes of the jurisdiction of the courts of the United. States."[20] For jurisdictional purposes, a national bank was placed "before

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[18] *Fin. Software Sys.,* 84 F.Supp.2d at 600 (citing *Leather Mfrs.' Nat'l Bank v. Cooper,* 7 S.Ct. 777,778 (1887)

[19] Act of March 3, 1887, ch. 373, [section] 4 , 24 Stat. 552, 554-55 (emphasis added.).

[20] *Leather Mfrs.' Nat'l Bank,* 7 S.Ct. at 7878 (emphasis added)

the law . . . the same as a bank not organized under the laws of the United States."[21]

In the judicial Code of 1911 Congress changed the structure of the jurisdictional provision of the 1887 Act, but retained its language regarding citizenship.[22] The design of the change was merely "to make the purpose of the re-enacted statute clearer" rather than to make a fundamental change.[23] Finally, in 1948 Congress amended the Judicial Code and enacted section 1348 in its present form.[24]

It is then plain that Congress enacted section 1348 against a backdrop of equal access to the federal courts for national banks, state banks, and corporations. Because section 1348 does not have any language modifying or rejecting the interpretive understanding that came with its predecessors,

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[21]Id.; see also *Mercantile Nat'l Bank v. Langdeau,* 83 S.Ct. 520, 526 (1963) ("Section 4 [of the 1882 Act] apparently sought to limit, with exceptions, the access of national banks to, and their suability in, the federal courts to the same extent to which non-national banks are so limited." (emphasis added)); *Petri,* 12 S.Ct., at 327 ("No reasons is perceived why it should be held that [C]ongress intended that national banks should not resort to federal tribunals as other corporations and individual citizens might.").

[22]*Fin. Software Sys.*, 84 F.Supp.2d at 600)

[23] *Herrmann v. Edwards,* 35 S.Ct. 839, 842 (1915). See also *Am. Sur. Co. v. Bank of Ca.*, 133 F.2d 160, 161-162 (9th Cir. 1943) (holding national bank with branch in Oregon was not citizen thereof for diversity purposes under predecessor of section 1348).

[24]See Act of June 25, 1948, ch. 646, 62 Stat. 933.

this court should presume that Congress intended to retain and incorporate the existing interpretive backdrop.[25] It follows that we should read section 1348 as retaining its objective of jurisdictional parity for national banks vis-a-vis state banks and corporations.

C

We are persuaded that this goal of jurisdictional parity is best served by interpreting "located" as referring to a national bank's principal place of business as well as the state specified in the bank's articles of association.[26] Since a bank, under 28 U.S.C. [section] 1332(c)(1), may be a citizen of no more than two states- the state where its principal place of business it located and its state of incorporation - maintaining jurisdictional parity between a national and state bank requires that the national bank have no more than two possible states of citizenship.[27]

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[25]See *Bragdon,* 118 S.Ct. at 2208; Cotton Sav. Ass'n, 111 S.Ct. at 1508-09.

[26]*Firstar* held that a national bank is located in, and therefore a citizen of, the state of its principal place of business and the state listed in its organization certificate.

[27]*Firstar*, 252 F.3d at 994. The OCC filed an amicus brief in *Firstar,* as it has in this case. Id. at 984. Following *Firstar* the OCC issued an interpretive letter reaffirming its support of "the interpretation of the statute and fundamental reasoning: of the *Firstar* court. OCC Interpretive Letter No. 952, 2002 WL 32072482, at *4 (Oct. 23, 2002).

The OCC, however, indicated that *Firstar's* "use of the state listed in the organization certificate as the analogue to the state of incorporation was incomplete" and that a more

Horton's position - that the national bank would be located in, and therefore a citizen of, each state in which it has a branch - would restrict a national bank's access to federal court under diversity jurisdiction, without similarly restricting a state bank.

D

Horton accepts that parity was intended, but offers a quite different view of what that parity is. Horton argues that Bank One does not seek the parity that Congress intended to achieve with the 1882 and 1887 Acts. Horton point to *Mercantile National Bank v. Langdeau,* deciding venue in

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thorough articulation of the position would be that "a national bank is a citizen of the state in which its principal place of business is located and of the state that was originally designated in its organization certificate and articles of association or . . . the state to which that designation has been changed under other authority.". Id.

In a recent case construing section 1348, a district court held "that a national bank is 'located' in, and thus a citizen of, the state of its principal place of business and the state listed in its most recent articles of association." *Evergeeen,* 262 F.Supp.2d at 1307.

While the OCC's position and evergreen do represent a more complete holding than that in *Firstar*, because Illinois is the state of Bank One's principal place of business, the state listed on its organization certificate, and the state listed in its most recent articles of association, it is not necessary to decide whether to a use the "organization certificate" test or the "articles of association" test.

state courts for suits against national banks.[28] In determining whether the jurisdictional provision of the 1882 Act had implicitly repealed earlier an venue provision, the Supreme Court explained that "[s]ection 4 apparently sought to limit, with exceptions, the access of national banks to, and their suability in, the federal courts to the same extent to which non-national banks are so limited."[29] In coming to this conclusion, the Court quoted from the Congressional Record:

> The proviso to [section] 4 of the 1882 Act first appeared as an amendment offered on the floor of the House by Representative Hammond, pursuant to the order of the House fixing the assignment of the bill H.R. 4167 as a special order See 13 Cong. Rec. 3900, 3901. Mr. Hammond succinctly stated the purpose of his amendment as follows: "My amendment, herefore, declares that the jurisdictional limits for and as to a national bank shall be the same as they would be in regard to a *State* bank *actually doing or which might be doing business by its side;* that they shall be one and the same." 13 Cong.. Rec., at 4049. Mr. Robinson then asked, "as I understand the gentleman's proposed amendment, it is simply simply to this effect, that a *national bank doing business within a certain State shall* be subject for all purposes of jurisdiction to precisely the same regulations to which a *State bank, if organized there,* would be subject." Mr.

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[28]83 S.Ct. at 521-22.
[29]Id. at 526.

Hammond replied, "That is all." Ibid.[30]

Horton argues that this quote from the Congressional Record evidences Congress's intent to treat national banks as citizens of the state in which they are "doing business," so that national banks would have jurisdictional parity within a particular state with the state banks chartered in that state. "Doing business within a certain State," according to Horton, includes the national bank's branches and would result in the national bank's being treated as a citizen of each state where it has a branch. Horton asserts that his approach achieves the parity Congress intended: a state bank organized in Texas, being a Texas citizen, would not be able to invoke diversity jurisdiction in a suit against a Texas citizen; hence, a national bank located or doing business in Texas, but presumably with its principal place of business and organization certificate in another state, should also not be able to invoke diversity jurisdiction against a Texas citizen.

Horton's reading of history is incomplete. At the time of the 1882 Act, indeed until 1927, national banks were not permitted to engage in branch banking - intrastate or interstate.[31] Therefore, the statement from the Congressional Record it not evidence that "located," or "doing business within a certain State., " means something more than principal place of business: All national banks in 1882 were doing business only in the state of their principal place of business.

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[30]Id. at 526 n. 22 (emphasis added)

[31]*Bougas*, 98 S.Ct. at 93; *Fin. Software Sys.*, 84 F.Supp.2d at 601-02.

Horton's position also ignores the Supreme Court's declarations that"[n]o reason is perceived why it should be held that congress intended that national banks should not resort to federal tribunals as other corporations: might, [32] and that "[a] national bank was by [the statue of 1882] placed before the law [for purposes of federal jurisdiction] the same as" non-national banks.[33] A national bank with its principal place of business and organization certificate in Illinois could hardly be treated the same before the law if a corporation from Illinois with a "branch" in Texas could get into federal court when sued by a citizen of Texas while the national bank, also with a branch in Texas, would not.

Finally, Horton's position would lead to a narrow concept of "parity." The national bank would enjoy access to diversity jurisdiction only when sued by or suing a citizen of a state in which the bank maintains no branch at all. Corporations and state banks do not have such a limited access to federal court.

E

Firstar and other courts have addressed the arguments upon which the *Iacono* court relied and expressly rejected *Iacono's* reasoning and conclusion.[34] Horton does not attempt to resurrect any of these rejected *Iacono* arguments, citing *Iacono* only once - to argue that *Iacono* represents the majority view.

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[32]*Petri,* 12 S.Ct. at 327
[33]*Leather Mfrs.' Nat'l Bank,* 7 S.Ct. at 778.
[34]*Firstar*, 253 F.3d at 989-93; *Fin. Software Sys.*, 84 F.Supp.2d at 604-07.

Iacono relied heavily on *Citizens & Southern National Bank v. Bougas,*[35] in which the Supreme Court read "located," for purposes of a venue provision of the National Banking Act to include the location of the bank's branches.[36] Bougas, however, does not construe section 1348 and merely points out in a footnote, with no further comment, that section 1348 uses the word "located." Because "[v]enue is distinct from jurisdiction."[37] and because *Bougas* expressly limits its opinion to how the federal statue applied in determining state court venue, using *Bougas* to interpret "located" in a jurisdictional statue is of questionably (sic)validity, if applicable at all.[38]

If *Iacono* also failed to recognize that the provision interpreted in *Bougas* was included in the National Banking Act,[39] and that section 1348 is found in the Judicial Code and Judiciary Act.[40] This undermines the rationale for using the venue provision construed by *Bougas* to aid in the interpretation of a jurisdictional statute, particularly when the same word can have different meanings - even within the

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[35]98 S.Ct. 88 (1977)

[36]*Iacono*, 785 S.Supp. at 32-34 (stating that *Bougas's* mention of section 1348 suggested that the Supreme Could (sic)would construe "located" in section 1348 as it had in *Bougas*); *Bougas,* 98 S.Ct. at 89-94.

[37]*Driscoll v. New Orleans Steamboat Co.*, 633 F.2d 1158, 1159 n.1 (5th Cir. 1981)

[38]*Firstar,* 253 F.3d at 989-91.

[39]12 U.S.C. [section] 21 et seq.

[40]28 U.S.C. [section] 1, et seq.; see also *Firstar,* 253 F.3d at 990.

same act.[41] *Bougas* itself recognized that "[t]here is no enduring rigidity about the word 'located,'" thus significantly weakening the interpretative applicability of the same word in a different act and in a different context.[42]

Iacono made an erroneous inference from a 1982 amendment to the venue provision.[43] Following *Bougas*'s holding that state court venue for a national bank could be in any county in which the bank had a branch, Congress amended the relevant venue provision to limit venue to the location of the bank's principal place of business." [44] Congress, however, did not change section 1348 at that time. This congressional inaction, according to *Iacono*, meant that Congress implicitly approved of the *Bougas* Court's definition of "located" for purposes of section 1348.[45]

However, "no basis exists for inferring that Congress intended for 'located' in 28 U.S.C. [section] 1348 to be interpreted in accord with *Bougas*."[46] As *Firstar* observed, the venue and the jurisdiction statutes for national banks are

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[41]See *Atl. Cleaners & Dyers v. United States*, 52 S.Ct. 607, 608-09 (1932) ("Most words have different shades of meaning, and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even in the same section.").

[42]*Bougas*, 98 S.Ct. at 93.

[43]See 12 U.S.C. [section] 94.

[44]*Firstar*, 253 F.3d at 992)

[45] *Iacono*, 785 S.Supp. at 33.

[46]*Firstar*, 253 F.3d at 992.

found in different acts and serve distinct purposes. [47] Further, there had been no cases prior to *Iacono* in 1992 suggesting that a national bank was a citizen of every state in which it had a branch. We are unwilling to infer from Congress's inaction with respect to section 1348 any intent to accept the *Bougas* definition of "located."

In *Iacono*, the district court maintained that because section 1348 used both "established" and "located," Congress must have intended for the two words to have different meanings.[48] The court then explained that this supported the holding that "established" meant principal place of business while "located" meant where the bank had branches.[49]

While the *Iacono* interpretation seems reasonable, it does not take into account that when Congress enacted the predecessor of section 1348, "established" and "located" would have been functionally equivalent for jurisdictional purposes because national banks had no branches.[50] As we have explained, national banks were not permitted to have interstate branches at the time of the 1882 and 1887 Acts that serve as the backdrop for section 1348. It is then difficult to conclude that Congress intended for the two words to have the different meanings that the *Iacono* court suggests. In any case, where it is not clear that the two words were intended to have different meanings, "the words should reflect the congressional goal of jurisdictional parity with state banks

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[47]Id.
[48]*Iacono*, 785 F.Supp. at 33.
[49]Id.
[50]See *Fin. Software Sys.*, 84 F.Suipp.2d at 604.

and corporations" rather than a meaning that overrides this goal.[51]

Horton makes a number of additional arguments, including the following: (1) Texas law determines that Bank One is a Texas domicillary, and thus a Texas citizen for diversity purpose; (2) since *Firstar,* the OCC has issued an interpretation of "located" that supports Horton's position; (3) certain sections in the National Banking Act use the term "located" to include location of branches; and (4) the *Firstar* result conflicts with Texas consumer protection laws and is bad policy.

The parties dispute which, if any, of these were properly raised before the district court. "[A}rguments not raised in the district court cannot be asserted for the first time on appeal."[52] However, "an argument is not waived on appeal if the argument on the issue before the district court was sufficient to permit the district court to rule on it.[53] Regardless of whether Horton sufficiently raised these additional arguments, they are without merit.

First, Horton argue that *the Firstar* analysis ignores state law and its impact on the scope of diversity jurisdiction and does not account for federalism concerns. Horton specifically argues that under Texas law, Bank One is a Texas domiciliary and, therefore, cannot be divers. As the "determination of one's State Citizenship for diversity purposes is controlled by

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[51]Id.

[52]*In re Liljeberg Enters., Inc.*, 304 F.3d 410,427 n. 29 (5th Cir. 2002)

[53]Id.

federal law, not by the law of any state," Texas law does not control here.[54]

Second, Horton claims that since the *Firstar* opinion, the OCC has changed its position.[55] This argument lacks merit. The Corporate Decision upon which Horton relies was issued prior to an Interpretative Letter[56] that reaffirmed OCC's agreement with *Firstar*. Furthermore, the Corporate Decision concerns the location of national banks for purposes of mergers and does not purport to interpret section 1348 - or even refer to it.

Third, Horton points to portions of the National Banking Act that arguably deem a national bank to be located wherever it has branches; Horton contends that "located" in section 1348 must have the same meaning. The OCC readily concedes that "[f]or some statutes a national bank may . . . be located in states in which it has branches."[57] A "normal rule of statutory construction" is that "identical words used in different parts of the same act are intended to have the same meaning."[58] This principle does not apply here, however, because the statutes cited by Horton are from the National

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[54]*Mas v. Perry*, 489 F.2d 1396, 1399 (5th Cir. 1974)
[55]See OCC Corporate Decision No. 2001-29, 2001 WL 1502558 (Sept. 28, 2001).
[56]See OCC Interpretative Letter No. 952, 2002 WL 32072482 (Oct. 23, 2002)
[57]Id. at *3 n.8.
[58]*Gustafson v. Alloyd Co.*, 115 S.Ct. 1061, 1067 (1995) (emphasis added) (internal quotation marks and citations omitted).

Banking Act while section 1348 is found in the Judicial Code.[59] This argument also fails.

Finally, Horton argues that viewing "located" in a manner that increases the scope of federal diversity jurisdiction makes Texas consumer protection remedies "difficult or remote." The rule, however, is that "[c]ontrol over the scope of diversity jurisdiction rests with Congress," and any related policy determinations are for Congress to make.[60] Relatedly, state law does not determine the scope of federal diversity jurisdiction.[61] Horton's argument is, therefore, unavailing.

IV

We construe section 1348 in light of Congress's intent to maintain jurisdictional parity between national banks on the one hand and state banks and corporation on the other. We hold that the definition of "located" is limited to the national bank's principal place of business and the state listed in its organization certificate and its articles of association. This results in a national bank's having access to federal courts by diversity jurisdiction to the same extent as a similarly situated state bank or corporation. It follows that, under section 1348, a national bank is not necessarily "located" in each and every state in which it has a branch, and the district court did not err in so holding.

AFFIRMED.

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[59] *Firstar,* 253 F.3d at 990.
[60] *Bianca v. Park-Davis Pharm. Div. of Warner-Lambert Co.*, 723 F.2d 392, 396 & n.5 (5th Cir. 1984)
[61] Mas, 489 F.2d at 1399.

(2)

Supreme Court, U.S.
FILED

04-989 JAN 3 - 2005

OFFICE OF THE CLERK

No.

In the

SUPREME COURT OF THE UNITED STATES

Sarah Jenkins Horton et al.,
Petitioners

v.

Bank One, N.A. et al.,
Respondents

On Petition for Writ of Certiorari
to the
United States Court of Appeals
for the Fifth Circuit

[PETITION FOR WRIT OF CERTIORARI]

SUPPLEMENTAL APPENDIX

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SUPPLEMENTAL APPENDIX

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Filed
Austin Division
MAY 6, 2003
Western Dist. of Texas
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By: s/ KW

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Sarah Jenkins Horton and George Leon Matassarin,

Plaintiffs,

v. Case No.A-03-CA-150-SS

Bank One, N.A.; Bank One Corporation and Bank One Wisconsin

Defendants.

ORDER

BE IT REMEMBERED on the 5th Day of May, 2003 the Court reviewed the file in the above-styled cause, specifically Plaintiffs' Motion to Remand and Request for Fees and Sanctions [#4] and Defendants' response [#5]. Having considered the motion and response, the case files as a whole and the applicable law, the Court enters the following opinion and order.

Factual and Procedural Background

The Plaintiffs, Sarah Jenkins Horton and George Matassarin, are Texas residents residing in Bastrop County and Bexar County, respectively. *See* First Amended Petition at [paragraph]1-2. The plaintiffs allege Horton entered into a loan agreement on July 7, 1999 with "Bank One, Texas NA" for financing of an automobile purchase. *Id.* at [paragraph] 6. Matassarin executed the agreement as a co-signor on the loan. *Id.* at [paragraph] 9. The plaintiffs contend the bank misappropriated Horton's payments to go toward interest only and made unauthorized transfers from her bank account. *Id.* at [paragraphs] 8,10,15. Additionally, they allege the defendants made adverse credit reports against both Horton and Matassarin. *Id.* at [paragraph]18. Finally, they assert the defendants harassed Horton and misrepresented their corporate status. *Id.* at [paragraphs] 19,20.

The plaintiffs filed their original petition in the 335th Judicial District Court of Bastrop County, Texas, Cause No. 24,221, on July 24, 2002. They sued Bank One Texas Corporation, Bank One Wisconsin a/k/a/ Bank One Corporation Midwest Regional Indirect Collections Center, and Banc One Credit Company, but not serve any of these defendants. They filed their first amended petition on December 5, 2002, suing Bank One, N.A., Bank One Corporation, and Bank One Wisconsin, a wholly owned subsidiary of Bank One, N.A. and a/k/a/ Bank One Corporation Midwest Regional Indirect Collections Center. The defendants contend they were served on or about December 10, 2002. In

their first amended petition, the plaintiffs allege violations of the Deceptive Trade Practices Act ("DTPA"), raise tort claims for intentional infliction of emotional distress and defamation, and request actual and punitive damages and attorney's fees. See First Amended Petition at [paragraphs] 20-23. They also state the defendants' actions constitute violations of the federal Fair Debt Collection Practices Act and the federal Truth in Lending Act and seek statutory penalties and attorney's fees under those laws. *Id.* at [paragraph] 25.

The defendants filed a motion to transfer venue, a plea in abatement, and an answer with special exceptions and a counterclaim on December 26, 2002. The counterclaim asserts Horton and Matassarin are in default under the terms of the loan agreement and seeks repayment of the principal and interest along with collection costs and attorney's fees. The plaintiffs answered the counterclaim on February 4, 2003. The defendants withdrew their motion to transfer on March 6, 2003. On March 12, 2003, the defendants removed the case to this Court. The plaintiffs now seek to remand the case to state court.

Analysis

The plaintiffs move to remand to state court. The removing party bears the burden of establishing federal jurisdiction. *De Aguilar v. Boeing Co.*, 47 F.3d 1404,1408 (5th Cir.), cert. denied, 516 U.S. 865 (1995). The defendants removed this case on the basis of diversity jurisdiction. A federal court has diversity jurisdiction over a case if it involves citizens

of different states and the amount in controversy exceeds $75,000.00, exclusive of interest and costs. 28 U.S.C. 1332 [sec.] 1332(a). When the complaint does not state the amount of damages a plaintiffs seeks, the defendant must prove the amount in controversy by a preponderance of the evidence. *Luckett v. Delta Airlines, Inc.,* 171 F.3d 295,298 (5th Cir. 1999). In this case, the plaintiffs concede the amount in controversy exceeds $75,000 but argue the defendants' removal was untimely. Additionally, the plaintiffs argue there is not complete diversity among the parties.

The plaintiffs' first amended petition does not state a monetary amount of damages sought. If a lawsuit is removable at the time of filing, the defendants must remove within thirty days of receiving the summons and complaint. 28 U.S.C. [sec.] 1446(b). If a suit is not removable at the time of filing, the defendants must file a notice of removal within thirty days of receiving a copy of an amended pleading, motion, order or other paper from which the defendants can ascertain the case has become removable. 28 U.S.C. [sec.] 1446(b). The information supporting removal in the amended pleading or other paper must be "unequivocally clear and certain" to start the thirty-day clock. *Basky v. Kroger Texas, LP*, 288 F.3d 208, 211 (5th Cir. 2002).

The defendants claim their March 12 removal was timely because they did not realize the amount in controversy exceeded $75,000 until they received a written settlement offer from the plaintiffs on February 28, 2003 in compliance with the notice

requirements of the DTPA. *See* Notice of Removal. Ex. B ("Johnson Affidavit"), at [paragraph] 5. The Fifth Circuit has held a post-complaint letter dealing with settlement terms may constitute an "other paper" for purposes of 28 U.S.C. [sec.} 1446(b). *Addo v. Globe Life and Accident Ins. Co.,* 230 F.3d 759,762 (5th Cir. 2000). The plaintiffs contend the defendants knew or should have known the amount in controversy exceeded $75,000 when they filed their counterclaim on February 4, 2003. The plaintiffs allege the defendants knew the plaintiffs sought at least $50,000 in damages because they stated in their first amended petition that discovery would be conducted under level 2 of Rule 190 of the Texas Rules of Civil Procedure instead of level 1, which applies to suits involving $50,000 or less. The plaintiffs further allege the defendants' counterclaim brought the amount in controversy to over $75,000 because even though the defendants sought only $10,753.07 in damages, they asserted discovery should be conducted under level 2. Therefore, the plaintiffs argue, the defendants must have been seeking almost $40,000 in attorney's fees to qualify for level 2 discovery and should have assumed the plaintiffs would seek that amount for attorney's fees as well. The plaintiffs' far-fetched argument does not consider that the plaintiffs' amended petition only requested $4,000 in attorney's fees or that cases involving less than $50,000 can also be conducted under discovery level 2 if both parties agree (which they did in this case). *E.G.,* TEX.R.CIV.P. 190.2. Even assuming the discovery level pleaded by plaintiffs in accordance with the Texas Rules of Civil Procedure is relevant to calculating the amount in

controversy for federal jurisdictional purposes, the Court finds the defendants have shown they did not have unequivocal evidence that the amount in controversy exceeded $75,000 until February 28, 2003. Accordingly, removal was timely.

The plaintiffs also contend this Court does not have diversity jurisdiction over the above-styled cause because there is not complete diversity among the parties. For jurisdictional purposes, a national banking association is a citizen of the state in which it is "located." 28 U.S.C. [sec.] 1348. The plaintiffs argue a banks is "located" wherever it can be found and , since the defendants have Bank One offices in Texas, it is located here. The plaintiffs cite district court cases holding banks are located in every state in which they have branches. *E.G., Connecticut Nat'l Bank v. Iacono,* 785 F. Supp. 30 (D.R.I. 1992). However, other district courts and the Court of Appeals for the Seventh Circuit have taken the opposite position, holding banks are located in the state of their principal place of business and the state listed on their organization certificates. E.G., Firstar *Bank, N.A. v. Faul,* 253 F.3d 982 (7th Cir. 2001); *Baker v. First Am. Nat'l Bank,* 111 F. Supp.2d 799 (W.D. La. 2000). The Seventh Circuit based its holding on an analysis of the historical background and canons of statutory interpretation, concluding Congress intended in 28 U.S.C. [sec.] 1348 to give national banks the same jurisdictional access to federal courts as state banks and other corporations. *Firstar,* 253 F.3d at 993. A district court in the Northern District of Texas followed the *Firstar* line of cases and held banks are located only in the state of their

principal place of business. *Bank One, N.A. v. Euro-Alamo Investments, Inc.*, 211 F. Supp2d 808, 810 (N.D. Tex. 2002). The Fifth Circuit has not ruled on the issue.

This Court finds the Seventh Circuit's reasoning persuasive in light of its extensive discussion of the history and circumstances surrounding the inclusion of the relevant language in the statute. If the Court were to interpret the statute to render national banks citizens of every state in which they have a branch, many banks would never receive the benefits of federal diversity jurisdiction. Therefore, the Court holds national banks are "located" in the state of their principal place of business and the state listed on their organizational certificate. The defendants have presented evidence that Bank One, N.A. is a national banking association with its principal place of business in Chicago; Bank One, N.A. is the successor by merger to Bank One Wisconsin, which was a state banking association chartered under Wisconsin law prior to the merger; and Bank One Corporation is a bank holding corporation organized under Delaware law with its principal place of business in Chicago. *See* Johnson Affidavit, at [paragraph] 4. Therefore, none of the defendants is a Texas citizen and there is complete diversity among the parties.

The Court holds it has subject matter jurisdiction over the above-styled cause, despite the plaintiffs' aversion to federal court. It is apparent from the motion to remand that the plaintiffs' counsel has never appeared in federal court, as the motion relies on outlandish accusations and overbroad conspiracy

theories and is wholly devoid of the professionalism expected of lawyers who practice in federal court. The Court expects the plaintiffs' future pleadings to rely on evidence and legal authority instead of generalized attacks on "rich corporate defendants," "big rich banking corporations and their bevy of lawyers" or "Rich Banks who steal poor people's money."

In accordance with the foregoing:

IT IS ORDERED that Plaintiffs' Motion to Remand and Request for Fees and Sanctions {#4} is DENIED.

SIGNED this the 5th day of may 2003.

S/_____
SAM SPARKS
UNITED STATES DISTRICT JUDGE

FILED
AUSTIN DIVISION

2003 JN 17 PM 3:31

Western District of Texas
By: s/_____
Deputy

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

**SARAH JENKINS HORTON AND
GEORGE LEON MATASSAIN,**
Plaintiffs,

-vs- Case No. A0930CA0150-SS

**BANK ONE, N.A.; BANK ONE CORP-
ORATION; AND BANK ONE WISCONSIN**
Defendants.

O R D E R

BE IT REMEMBERED on the 17th day of June 2003 the Court reviewed the file in the above-styled cause, specifically the Plaintiffs' Motion for Certification that Order Denying Remand is Proper for an Interlocutory Appeal [#10] and the Defendants' response thereto [#14] and amended response [#15]./ Having considered the motion and response, case file

as a whole and the applicable law, the Court enters the following opinion and order.

On May 5, 2003, the Court signed an Order denying the plaintiff's motion to remand, holding: (1) the defendants' removal was timely because it was within thirty days of the defendants' receipt of a written settlement offer indicating the amount in controversy is over $75,000: and (2) the Court has diversity jurisdiction over the above-styled cause because the defendants are not Texas citizens and the amount in controversy exceeds $75,000.00. On May 19, 2003, the plaintiffs filed a motion for the Court to certify its Order denying remand for interlocutory appeal under 28 U.S.C. [sec.] 1292(b).

Generally, an order denying remand may not be appealed until after judgment is entered. See *Caterpillar Inc. v. Lewis,* 519 U.S. 61, 74, 117 S.Ct. 467 (1996). A district court may, in its discretion, certify a not otherwise appealable order under 28 U.S.C. [sec.] 1292(b) when it is "of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. [sec.] 1292(b).[1]

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[1] The defendants argue in their response that appeal is precluded by 28 U.SC. [sec.] 1447(d). However, that section relates only to federal court orders remanding causes to state court, not orders denying motions to remand. Thankfully, the defendants

The plaintiffs contend the order denying remand is appropriate for interlocutory appeal because: (1) courts differ as to whether national banking associations are citizens of every state in which they are located; and (2) whether a settlement offer can establish an amount in controversy for removal purposes. As to the second question, the Court notes it is settled law in the Fifth Circuit that a post-complaint settlement letter constitutes an "other paper" for purposes of triggering the thirty-day deadline for removal under 28 U.S.C. [sec.] 1446(b). *See Addo v. Globe Life & Accident Ins. Co.*, 230 F.3d 759, 762 (5th Cir. 2000). Because the plaintiffs' state court petition did not state the amount of damages sought, the defendants did not know the amount in controversy exceeded $75,000.00 until they received plaintiffs' counsel's February 28, 2003 letter stating each plaintiff sought $30,000 in personal injury damages and plaintiffs' counsel had already accrued $54,500 in attorney's fees and expected to bill in excess of $150,000 by the conclusion of the lawsuit. Because the Court finds the law clearly establishes the timeliness of the removal, interlocutory appeal is inappropriate on this question.

However, the Court considers the question of whether national banking associations are citizens of every state in which they have a branch to be an appropriate question for interlocutory appeal under 28 U.S.C. [sec.] 1292(b). As discussed in the order

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recognized this point and removed this argument from their amended response.

denying remand, courts have split on whether a national banking association is "located" for jurisdictional purposes in any state where it has a branch or only in the state in which its principal place of business is located and the state listed on its organizational certificate. Under 28 U.S.C. [sec.] 1348, national banking associations are "deemed citizen of the State in which they are respectively located." 28 U.S.C. [sec.] 1348. Courts have followed two varying definitions of "located." One line of cases beginning with the Rhode Island federal district court's decision in *Connecticut Nat'l Bank v. Iacono,* 785 F.Supp. 30 (D.R.I 1992) holds national banking associations are "located" wherever they have branch offices. *See Also First Union Corp.* v. *Am. Cas. Co., of Reading, P.A.*, 222 F.Supp2d (W.D.N.C. 2001); *Schmidt v. Fleet Bank,* 16 F.Supp.2d 340,3543 (S.C.N.Y. 1998); *Ferraiolo Constr. v. Keybank N.A.,* 978 F.Supp.23,23 (D.Maine 1997); *Norwest Bank Minnesota N.A. v. Patton,* 924 F.Supp. 114,115 (D. Colo, 1996); *Bank of New York v. Bank of Am.,* 861 F.Supp. 225,231 (S.C.N.Y 1994). Other courts, including the only circuit court to issue a decision on the issue, have held a bank is "located" only in the state of its principal place of business and the state listed on its organizational certificate. *E.G., Firstar Bank N.A. v. Faul.,* 253 F.3d 982 (7th Cir. 2001); *Pitts v. First Union Nat'l Bank,* 217 F.Supp.2d 629, (D.Md. 2002); *Bank One, N.A. v. Euro-Alamo Investments, Inc.,* 211 F.Supp.2d 808,810 (NN.D. Tex. 2002); *Bank of Am., N.A. v. Johnson,* 186 F.Supp.2d 1182 (W.D. Okla. 2001); *Baker v. First Am. Nat'l Bank,* 111 F.Supp.2d 799 (W.D. La. 2000); *Financial Software Sys. Inc. v. First Union Nat'l*

Bank, 84 F.Supp.2d 594 (E.D. Pa., 1999). In its May 5, 2003 order, this Court agreed with the well-researched reasoning in the latter line of cases and concluded it has diversity jurisdiction.

As the above citation strings indicate, the meaning of "located" in 28 U.S.C. [sec.] 1348 for purposes of diversity jurisdiction is a hotly contested issue. There are two distinct trails of precedent courts an follow, and the Fifth Circuit has yet to give a signal as to which direction the district courts within it should go. At least two other district courts in the Fifth Circuit have gone the same route as this Court. If this Court has chosen the wrong path, it has no jurisdiction over the above-styled cause and any further proceedings in the case will be fruitless. Accordingly, because courts are split on this issue and the issue materially affects the ultimate termination of the lawsuit in this Court, the Court holds its May 5, 2003 order denying the plaintiff's motion to remand is appropriate to certify for interlocutory appeal under 28 U.S.C. [sec.] 1292(b). *See, e.g. Tedford v. Warner-Lambert Co.*, 327 F.3d 423 (5trh Cir. 2003) (hearing interlocutory appeal of district court's denial of motion to remand where circuit court had not decided an issue and district courts had come to different conclusions); *Grant v. Chevron Phillips Chem. Co.*, 309 F.3d 864,866(5th Cir. 2002) (district court's certification of order denying remand for interlocutory appeal was "highly principled" where amount in controversy question had divided district courts).

In accordance with the foregoing:

IT IS ORDERED that Plaintiffs' Motion for Certification that Order Denying Remand is Proper for an Interlocutory Appeal [#10} is GRANTED, and the Court's order of May 4, 2003 denying plaintiffs' motion to remand is hereby CERTIFIED for interlocutory appeal under 28 U.S.C. [sec.] 1292(b).

SIGNED this 17th day of June, 2003.

S/__ _____
SAM SPARKS
UNITED STATES DISTRICT JUDGE

U.S. Court of Appeals
FILED
JUL 31, 2003
CHARLES R. FULBRUGE III
Clerk

FILED

AUG 11, 2003
Clerk U.S> District Court
Western District of Bexas
By: s/_____
Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. o3-31

SARAH JENKINS HORTON,
GEORGE LEON MATASSARIN
Plaintiffs-Counter Defendants-Petitioners
v.

BANK ONE NA
Defendant-Counter Claimant-Respondent
v.
BANK ONE CORPORATION, BANK ONE WISCONSIN
Defendants - Respondents

Petition for Leave to Appeal
from an Interlocutory Order

Before BARKSDALE, EMILION M. GARZE AND DENNIS, Circuit Judges.

BY THE COURT:

IT IS ORDERED that leave to appeal from the interlocutory order of the United States District Court for the Western District of Texas, Austin, entered on 6 May, 2003, is GRANTED, as to the issue certified by the district court on 17 June 2003 for interlocutory appeal: whether national banking associations are citizens of every state in which they have a branch.

A true copy
Test:
Clerk U.S. Court of Appeals, Fifth Circuit

By s/ Mary Stewart____
Deputy June 31, 2003

s/R_B
7/17/03

s/ SMG

s/ JD

FEB 16 2005
OFFICE OF THE CLERK

(5)

No. 04-989

IN THE

Supreme Court of the United States

SARAH JENKINS HORTON *et al.*,

Petitioners,

v.

BANK ONE, N.A., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN RESPONSE TO PETITION FOR CERTIORARI

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February 16, 2005

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether the Fifth Circuit was correct when it held—in agreement with the Seventh and Ninth Circuits, but in clear conflict with the Second and Fourth Circuits—that a national bank is a citizen (for purposes of diversity jurisdiction) of the State of its principal place of business and the State listed in its articles of association.

PARTIES TO THE PROCEEDINGS

In addition to Sarah Jenkins Horton, George L. Matassarin was Plaintiff/Counter-Defendant/Appellant below, and is Petitioner here.

In addition to Bank One, N.A., Bank One Corporation and Bank One Wisconsin were Defendants/Counter-Plaintiffs/Appellees below, and are Respondents here.

RULE 29.6 STATEMENT

Bank One Wisconsin was a Wisconsin state charter bank. It had been merged into Bank One, N.A. by the time of this lawsuit.

Bank One, N.A. was a national banking association, whose 100% parent was Bank One Corporation. Its successor by merger is JPMorgan Chase Bank, N.A., whose 100% parent is JPMorgan Chase & Co.

Bank One Corporation was a bank holding company. Its successor by merger is JPMorgan Chase & Co.

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IN THE

Supreme Court of the United States

No. 04-989

SARAH JENKINS HORTON *et al.*,

Petitioners,

v.

BANK ONE, N.A., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN RESPONSE TO PETITION FOR CERTIORARI

Respondents Bank One, N.A., Bank One Corporation and Bank One Wisconsin (collectively, "Bank One") herein respond to the Petition for a Writ of Certiorari, and agree that certiorari should be granted to resolve the critical issue presented, which involves a fundamental jurisdictional question of national importance.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

The decision of the court of appeals is published at 387 F.3d 426 (5th Cir. 2004), and is reproduced in the Appendix to the Petition ("Pet. App.") at 1a-19a. The decision of the district court is unpublished, and is reproduced at Pet. Supp. App. 20a-27a.

JURISDICTION

The decision of the court of appeals was entered on October 5, 2004. Pet. App. 1a. The court of appeals denied rehearing and rehearing en banc on November 18, 2004. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY OR OTHER LEGAL PROVISIONS

28 U.S.C. § 1332 provides, in pertinent part:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—
>
> (1) citizens of different States ....

28 U.S.C. § 1348 provides:

> The district courts shall have original jurisdiction of any civil action commenced by the United States, or by direction of any officer thereof, against any national banking association, any civil action to wind up the affairs of any such association, and any action by a banking association established in the district for which the court is held, under chapter 2 of Title 12, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by such chapter.
>
> All national banking associations shall, for the purposes of all other actions by or against them, be deemed citizens of the States in which they are respectively located.

INTRODUCTION

Bank One agrees that the Petition should be granted. Although Bank One prevailed below and believes that the decision of the Fifth Circuit was correct, the Petition presents an

issue of national importance upon which the federal circuit courts are unquestionably divided. Moreover, the issue is a recurring one and the Court will have the benefit of scholarly lower-court opinions on both sides to guide its resolution of the issue. This Court's review is necessary to prevent the uncertainty, lack of uniformity and forum-shopping that will otherwise result.

The precise issue presented is how to determine the citizenship of a national bank for purposes of diversity jurisdiction. Three circuits (the Fifth, in the decision below, and the Seventh and Ninth) have concluded that a State is "located in" (and therefore a citizen of) two States—*viz.*, the State of its principal place of business, and/or the State listed on its organization certificate. Two other circuits (the Second and the Fourth) have reached a directly contrary result, holding that a bank is "located" in every State where it has a branch office and is, therefore, potentially a citizen of every single State. The Eleventh Circuit has indicated that it would follow this latter path as well. This clear and acknowledged division of authority amply justifies certiorari.

Furthermore, the issue presented concerns the scope of federal jurisdiction and thus involves basic questions of federalism that reinforce the importance of this Court's review. This Court repeatedly has granted certiorari to address important issues of federal jurisdiction, and it is undisputed that this case presents such a question. Section 1348 determines jurisdiction in every case in which a national bank is a party. And, no matter what the proper analysis of § 1348, some substantial portion of the federal judiciary is committing an intolerable error. Either some courts are improperly refusing to exercise jurisdiction, which they have an unflagging obligation to do, or other courts are improperly exercising jurisdiction that they do not have, which is equally forbidden. Either way, this Court should grant certiorari to resolve this frequently recurring issue of national importance.

STATEMENT

The facts of this case are significant only because they are so very commonplace and, as such, demonstrate the far-reaching implications of the question presented.

In 2002, Petitioner Horton (a citizen of Texas) brought suit against Bank One in Texas state court, in which she alleged state-law claims arising out of a dispute concerning a car loan. Pet. App. 2a. Bank One, for which Illinois is both the principal place of business and also the State listed on its organization certificate, *id.* at 3a, removed the case to federal district court based on diversity of citizenship, *id.* at 2a. Horton sought to remand the case to state court. She contended that, because Bank One has branches in Texas, it is "located" in that State for purposes of 28 U.S.C. § 1348, the parties are non-diverse, and federal jurisdiction is therefore lacking. Pet. App. 2a. The district court concluded that the parties were diverse, and denied Horton's motion. *Id.*

The Fifth Circuit affirmed. Pet. App. 2a. Relying upon the Seventh Circuit's 2001 decision in *Firstar Bank, N.A.* v. *Faul*, 253 F.3d 982 (7th Cir. 2001), the court "analyzed the text, history, and purpose of section 1348 and its predecessors," Pet. App. 4a, and concluded that "a national bank is not 'located' in, and thus not a citizen of, every state in which it has a branch," *id.* at 5a. Because it concluded that the term "located" is ambiguous, *id.*, the court looked to the history of § 1348's predecessor statutes, *id.* at 6a-9a. It reasoned that Congress's longstanding goal of ensuring "equal access to the federal courts for national banks, state banks, and corporations," *id.* at 8a, "is best served by interpreting 'located' as referring to a national bank's principal place of business [and] the state specified in the bank's articles of association," *id.* at 9a.

After rejecting Horton's interpretation of this history, Pet. App. 10a-13a, the court went on to address a series of other interpretive arguments. It concluded that this Court's deci-

sion in *Citizens & Southern National Bank* v. *Bougas*, 434 U.S. 35 (1977)—which interpreted a venue provision that employs the term "located"—does not resolve the jurisdictional question. Pet. App. 14a-15a. It determined, furthermore, that no implication could be drawn from the separate use of the terms "established" and "located" in § 1348. *Id.* at 16a-17a. Rejecting Horton's argument that different words must invariably have different meanings, the court properly recognized that for historical reasons, those terms had the same meaning in this context at the time the original statute was enacted. *Id.* In the end, the court of appeals concluded simply that "the definition of 'located' is limited to the national bank's principal place of business and the state listed in its organization certificate and its articles of association." *Id.* at 19a.

REASONS FOR GRANTING THE PETITION

I. THERE IS A CLEAR AND ACKNOWLEDGED CIRCUIT SPLIT OVER THE MEANING OF 28 U.S.C. § 1348, AND THE ISSUE IS RIPE FOR REVIEW.

1. There can be no question, as both Horton and Bank One agree, that there is a deep and recognized split among the federal circuit courts concerning the proper interpretation of the term "located" in 28 U.S.C. § 1348, which governs the citizenship of national banks for purposes of federal diversity jurisdiction. See *id.*; *id.* § 1332.

The Fifth Circuit, in the decision below, followed the Seventh Circuit in holding that a national bank is "located" only within "'the state of its principal place of business and the state listed in its organization certificate.'" Pet. App 4a; *Firstar*, 253 F.3d at 994. The Ninth Circuit has similarly interpreted a precursor to § 1348 as establishing the citizenship of national banks in "those states in which their principal places of business are maintained," not "upon the basis of branch

business offices." *American Sur. Co.* v. *Bank of Cal.*, 133 F.2d 160, 162 (9th Cir. 1943); see also *United States Nat'l Bank* v. *Hill*, 434 F.2d 1019, 1020 (9th Cir. 1970) (per curiam) (reaffirming *American Surety Co.*). And the Office of the Comptroller of the Currency repeatedly has adopted this same position, both in an opinion letter, *see* Office of the Comptroller of the Currency, Interpretive Letter No. 952 (Oct. 23, 2002), *available at* 2002 WL 32072482, at *4, and in briefs filed in the Fourth, Fifth and Seventh Circuits.[1]

By contrast, a divided panel of the Fourth Circuit concluded that "'located' should be construed to render banking associations citizens of the states in which they operate branch offices." *Wachovia Bank, Nat'l Ass'n* v. *Schmidt*, 388 F.3d 414, 416 (4th Cir. 2004), *reh'g & reh'g en banc denied*, No. 03-2061 (4th Cir. Jan. 28, 2005). The Second Circuit adopted the same interpretation of § 1348 in *World Trade Center Properties, L.L.C.* v. *Hartford Fire Insurance Co.*, 345 F.3d 154, 161 (2d Cir. 2003) ("Defendant ... is a national bank ... and by statute is deemed to be a citizen of every state in which it has offices."), and the Eleventh Circuit has indicated that it would adopt the same rule (although it later vacated its judgment when the case settled), see *In re First Nat'l Bank of Boston*, 70 F.3d 1184, 1188 n.3 (11th Cir. 1995), *vacated on other grounds*, 102 F.3d 1577 (11th Cir. 1996).

Not only is this conflict mature, but the comprehensive analyses undertaken by the Fourth, Fifth and Seventh Circuits demonstrate that there is nothing to be gained by waiting further. Those decisions, authored by three eminent jurists (Judges Flaum, Higginbotham and Luttig) are exhaustive and they consider—and disagree about—the significance of every

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[1] The Court not infrequently invites the Solicitor General to provide the views of the United States at the certiorari stage when a federal agency clearly has an interest in a case. Here, however, the views of the Office of the Comptroller of the Currency on the question presented are known, and the Solicitor General undoubtedly will present the government's views on the merits.

tool that the Court will use to interpret § 1348. For instance, the Fifth and Seventh Circuits have concluded that the term "located" has no "plain meaning," whereas the Fourth Circuit determined that the term "located" does have a plain meaning that definitively supports its interpretation of the term. Compare Pet. App. 5a, and *Firstar*, 253 F.3d at 987, with *Wachovia*, 388 F.3d at 416-18. The Fifth and Seventh Circuits determined that earlier statutes established a "settled meaning" of the term "located" that was ratified by the 1948 enactment of § 1348; the Fourth Circuit reviewed the same history and reached the opposite conclusion. Compare Pet. App. 6a-10a, and *Firstar*, 253 F.3d at 988-89, with *Wachovia*, 388 F.3d at 425-31.

These courts have likewise divided—and again, expressly so—over the relevance of *other* statutes that employ the term "located" in interpreting § 1348. Compare Pet. App. 14a-16a, 18a-19a, and *Firstar*, 253 F.3d at 989-91, with *Wachovia*, 388 F.3d at 418-25. In the course of analyzing this one aspect of § 1348, the courts further disagreed over the applicability of the rule of *in pari materia*, the relevance of this Court's decision in *Bougas*, and the significance of a 1982 amendment to the venue statute. Next, the decisions conflict as to whether it is necessary (as a matter of statutory construction, informed by the history of the banking industry) to accord different meanings to the different terms "established" and "located" in § 1348. Compare Pet. App. 16a-17a, and *Firstar*, 253 F.3d at 991-92, with *Wachovia*, 388 F.3d at 419-21. Finally, the circuits conflict even as to underlying policy considerations—namely, the possibility of local bias against national banks, and the relevance of that fact in analyzing this aspect of diversity jurisdiction. Compare *Firstar*, 253 F.3d at 993, with *Wachovia*, 388 F.3d at 424-25. Simply put, these three courts have exhaustively considered the arguments for and against the competing interpretations of § 1348, and have reached differing conclusions as to each of these arguments. This

Court's review will have the benefit of these thorough analyses.[2]

II. THIS JURISDICTIONAL ISSUE IS OF NATIONAL IMPORTANCE.

That this case concerns the proper scope of federal diversity jurisdiction is further reason that certiorari is warranted. Because of the importance of jurisdictional issues, this Court repeatedly grants certiorari to address questions of federal ju-

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[2] Indeed, the circuit courts' clear division of authority and thorough discussion of the relevant arguments is bolstered by an even deeper nationwide division of authority among federal district courts. In published decisions alone—and there are multiple unpublished decisions as well—at least nine district courts in six circuits have gone the way of the Fifth and Seventh Circuits, and another five district courts in four circuits have reached the contrary result.

Compare Adams v. *Bank of Am., N.A.*, 317 F. Supp. 2d 935, 941-42 (S.D. Iowa 2004) (concluding that "located" does not include branch offices), *MBIA Ins. Corp.* v. *Royal Indem. Co.*, 294 F. Supp. 2d 606, 611 (D. Del. 2003), *Carl* v. *Republic Sec. Bank*, 282 F. Supp. 2d 1358, 1364 n.1 (S.D. Fla. 2003), *appeal dismissed*, No. 03-12239-JJ, 2003 WL 22172202 (11th Cir. Aug. 5, 2003), *Evergreen Forest Prods. of Ga., LLC* v. *Bank of Am., N.A.*, 262 F. Supp. 2d 1297, 1307 (M.D. Ala. 2003), *Pitts* v. *First Union Nat'l Bank*, 217 F. Supp. 2d 629, 631 (D. Md. 2002), *Bank One, N.A.* v. *Euro-Alamo Invs., Inc.*, 211 F. Supp. 2d 808, 810 (N.D. Tex. 2002), *Baker* v. *First Am. Nat'l Bank*, 111 F. Supp. 2d 799, 800 (W.D. La. 2000), *Financial Software Sys., Inc.* v. *First Union Nat'l Bank*, 84 F. Supp. 2d 594, 602 (E.D. Pa. 1999), *and Bank of Am., N.A.* v. *Johnson*, 186 F. Supp. 2d 1182, 1183 (W.D. Okla. 2001), *with First Union Corp.* v. *American Cas. Co. of Reading, Pa.*, 222 F. Supp. 2d 767, 769-70 (W.D.N.C. 2001) (reaching the opposite conclusion), *Frontier Ins. Co.* v. *MTN Owner Trust*, 111 F. Supp. 2d 376, 379-80 (S.D.N.Y. 2000), *Ferraiolo Constr., Inc* v. *Keybank, N.A.*, 978 F. Supp. 23 (D. Me. 1997), *Norwest Bank Mi ., N.A.* v. *Patton*, 924 F. Supp. 114, 115 (D. Colo. 1996), *Bank of New York* v. *Bank of Am.*, 861 F. Supp. 225, 231 (S.D.N.Y. 1994) *and Connecticut Nat'l Bank* v. *Iacano*, 785 F. Supp. 30, 33-34 (D.R.I. 1992). Among this latter group, some courts have even held that a bank is a citizen of any State in which it has a "substantial presence," even if it has no branch office. *E.g.*, *Frontier Ins. Co.*, 111 F. Supp. 2d at 380; *Bank of New York*, 861 F. Supp. at 231.

risdiction even absent any circuit split. *E.g.*, *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 806 (1976); *Hagans* v. *Levine*, 415 U.S. 528, 533 (1974); *Executive Jet Aviation, Inc.* v. *City of Cleveland, Ohio*, 409 U.S. 249, 252 (1972); *Bowen* v. *Johnston*, 306 U.S. 19, 22 (1939).

The reason for this is plain. Because "[f]ederal courts are courts of limited jurisdiction," *Kokkonen* v. *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994), the evaluation of jurisdiction holds a privileged place in federal jurisprudence. This is the reason, for instance, that "every federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review.'" *Bender* v. *Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). In this case, in fact, both the district court and the Fifth Circuit recognized the importance of the jurisdictional issue, as evidenced by their decisions to certify and take an interlocutory appeal, respectively. Pet. Supp. App. 27a-32a, 33a-34a.

For all of these reasons, a conflict concerning the scope of federal diversity jurisdiction cannot go unresolved. With few exceptions, federal jurisdiction is obligatory, both as to what it includes and what it excludes. Federal courts have a "virtually unflagging obligation ... to exercise the jurisdiction given them," *Colorado River*, 424 U.S. at 817; and, conversely, they may not exercise jurisdiction that has not been conferred, *Bender*, 475 U.S. at 541. The conflict presented here means that some federal courts necessarily have run afoul of one of these two basic precepts, and will continue to do so absent this Court's intervention. Horton believes that courts in the Fifth, Seventh and Ninth Circuits (and numerous other district courts) are improperly exercising jurisdiction that they do not have. Bank One believes that courts applying the opposite rule—the one adopted by the Fourth Circuit, among other courts—are refusing to exercise jurisdiction that it is their duty to assume. Whichever party is correct, an intolerable error is repeatedly occurring which must be corrected.

Moreover, because the question presented concerns diversity jurisdiction, it further implicates the division of responsibility between state and federal courts, and the boundaries of federalism. The exercise of diversity jurisdiction, of course, divests state courts of authority that otherwise would be theirs. See generally *Younger* v. *Harris*, 401 U.S. 37, 43-45 (1971) (recognizing the need to afford comity to state courts). If, however, Congress has mandated diversity jurisdiction under § 1348 as the Fifth Circuit concluded, then the failure of courts in the Fourth Circuit and elsewhere to exercise that jurisdiction frustrates the congressional scheme, and denies litigants their right to a federal forum.

This issue is of additional significance because § 1348 applies to national banks. Absent review by this Court, an institution like Bank One, which has branches in 14 States around the country,[3] will be subject to a patchwork of state-federal jurisdiction. Different rules will apply to it in different States where it has branches—one rule for Texas and Illinois; another for West Virginia. The consequences are all the more severe for national banks that have branches in nearly every State. (Indeed, were the rule of the Fourth Circuit adopted nationwide, such institutions would effectively be denied access to federal courts based on diversity jurisdiction.) Every bank that has a presence in multiple States is now at the whim of a forum-shopping plaintiff, who can determine whether her suit will proceed in state or federal court based upon the local interpretation of § 1348.

III. THIS CASE PRESENTS A GOOD VEHICLE TO CONSIDER THIS ISSUE.

Finally, this case is a particularly appropriate vehicle to address § 1348. In the first place, both parties agree that the is-

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[3] *See* BankOne ATM/Branch Locator, *at* http://www.bankone.com/help/bolhelplocator.aspx (last visited Feb. 14, 2005). As a practical matter, that number is now 17: Branches in three additional States were added as a result of the merger with JPMorgan Chase.

sue is worthy of certiorari, and join in asking this Court to hear the case. Furthermore, the issue is cleanly presented, with no factual complexities to hinder this Court's evaluation of the underlying legal issue. Indeed, this is the rare case in which the case's interlocutory posture makes the case more appropriate for review, rather than less. Unlike the normal case—in which the prudential decision to await final judgment prevents the Court from unnecessarily adjudicating issues that may be rendered moot and permits the development of a full factual record—a final judgment in this case can add nothing to this Court's consideration of the jurisdictional issue. On the contrary, immediate determination of the jurisdictional issue is appropriate. As this Court recognized in the course of explaining why it would address an interlocutory issue of venue:

> This is a separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action. Moreover, we believe that it serves the policy underlying the requirement of finality ... to determine now in which ... court appellants may be tried rather than to subject them, and appellee, to long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings.

Mercantile Nat'l Bank at Dallas v. *Langdeau*, 371 U.S. 555, 558 (1963); cf. *Tidewater Oil Co.* v. *United States*, 409 U.S. 151, 171 n.45 (1972) (recognizing that a "threshold issue of jurisdiction" is the type of "controlling question [which could] end all proceedings," that may be appropriate for interlocutory review on certiorari). There are no facts relevant to this jurisdictional issue yet to be developed. In sum, this case squarely presents an issue this Court should resolve now.

CONCLUSION

For the foregoing reasons, and those set forth in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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No. 04-989

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SUPPLEMENTAL BRIEF

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SUPPLEMENTAL BRIEF

All parties agree, and the Petition and the Brief in Response both demonstrate, that the Court is confronted in this case with a clean, square, irreconcilable conflict on a jurisdictional issue of national importance—*viz.*, where a national bank is "located" for purposes of federal diversity jurisdiction. The existence and importance of this conflict is confirmed by the Brief *Amicus Curiae* filed by the American Bankers' Association (ABA) in this case, and by the petition presenting the same issue filed in *Wachovia Bank, N.A.* v. *Schmidt*, No. 04-1186.

The remaining question is ***when*** (not whether) the Petition should be granted. Wachovia has suggested that the Court's decision on the petition in this case should be delayed to allow the Court to decide Wachovia's petition at the same time. See Br. of Wachovia Bank, Nat'l Ass'n as *Amicus Curiae* in Support of Neither Party at 3 ("Wachovia Br."); Pet. for Writ of Certiorari at 3, 18, *Wachovia Bank, N.A.* v. *Schmidt* (No. 04-1186). Bank One had no inherent objection to following that course, despite the fact that it was unclear whether the delay would serve any purpose since there are no problems with using this case as the vehicle to resolve the pure legal question presented in both cases. Now, however, there is a real risk that the *Wachovia* petition may not be fully ripe for resolution before the end of the Term. The *Horton* petition is ripe for resolution now. Accordingly, and because of the important and time-sensitive nature of the issue presented, this case should no longer be held for *Wachovia*. If resolution of the *Wachovia* petition is delayed beyond the April 22 Conference (at which both petitions are currently scheduled to be considered), the Court should consider the *Horton* petition immediately and hold the *Wachovia* petition pending a resolution of *Horton* on the merits.

1. As the petition in this case demonstrates and the Brief in Response confirms, there is no impediment in this case to a

full and complete consideration of the question presented. The issue is squarely presented. Resp. 4-5, 10-11. There is a mature and acknowledged conflict concerning this issue among at least three, and perhaps as many as six, courts of appeals. *Id.* at 5-6. Those courts have rehearsed in detail the relevant arguments, and have reached fundamentally different conclusions as to those arguments. *Id.* at 6-8. And this jurisdictional issue is of paramount importance. *Id.* at 8-10. In short, this case is an ideal vehicle for fully considering the question presented.

2. After Bank One filed its Brief in Response, Wachovia—acting as *Amicus Curiae*—suggested that disposition of the petition in this case should be held until Wachovia could file a petition presenting the same issue in another case. Wachovia Br. at 3. Wachovia's suggestion that the Court defer consideration of this case was predicated on the assertion that to do so "would not materially delay the resolution of this case"—because Wachovia would file its own petition early in order to ensure that both petitions would be considered before the end of the Term. *Id.* at 4. And, it appears that the Court accepted Wachovia's suggestion to consider the two petitions in tandem: The *Horton* petition was circulated on March 2 for consideration at the March 18 Conference, yet no action was taken at that Conference, nor was *Horton* immediately relisted. *Horton* was not relisted until after respondents waived response in *Wachovia*, at which time both the *Horton* and *Wachovia* petitions were circulated for consideration at the Court's upcoming April 22 Conference.

Bank One did not oppose Wachovia's suggestion that the petitions be considered together, on the understanding that the *Horton* petition would still be considered this Term. But, there now exists a real risk that *Wachovia* will not be considered before the end of the Term. This case already has been postponed by a month because *Horton* was decided before *Wachovia*. Now, respondents in *Wachovia* have waived response. It is almost certain that the Court will request a re-

sponse, but allow the *Wachovia* respondents 30 days within which to file.[1] Thus, by the time the Court orders a response and one is actually filed, it is quite possible that there will be no more conferences before the end of the Term.

Given the possibility of significant delay in *Wachovia*, holding the *Horton* petition pending *Wachovia* can no longer be justified. *Horton* squarely poses the question presented; nothing in particular is gained by having it consolidated with *Wachovia*. Moreover, banks with pending cases will suffer prejudice if the *Horton* petition is delayed over the summer. Where diversity jurisdiction is concerned, "a case may not be removed ... more than 1 year after commencement of the action." 28 U.S.C. § 1446(b). If the petition in this case is held pending disposition of the *Wachovia* petition, and certiorari is not granted until the end of September, then the case will not be argued until January, and a decision is unlikely to issue before next March. Such a delay effectively guarantees that banks in the Fourth Circuit will be denied the federal forum to which they are entitled—for, as *Amicus Curiae* ABA has properly noted, courts within the Fourth Circuit have already begun remanding cases for lack of diversity, see ABA Br. at 4 & n.4, and those cases will be more than one year old by the time a decision by this Court likely would be handed down.

The importance of this issue is ample reason for the Court to consider *Horton* and grant certiorari no later than its April 22 Conference. How the term "located" is interpreted for purposes of diversity jurisdiction affects every national bank, and determines whether the federal courts have jurisdiction in potentially every case involving such a bank. Whatever benefit might once, arguably, have been gained by considering

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[1] When response has been waived, the Court normally does not grant a petition for certiorari without first requesting a response from the respondents. *See* Robert L. Stern et al., *Supreme Court Practice* 461-62 (8th ed. 2002).

Horton and *Wachovia* together is now more than outweighed by the delay that *Wachovia* is imposing upon both cases.

CONCLUSION

For the foregoing reasons, and those set forth in the Petition and the Brief in Response, the Court should consider the Petition in this case without regard to what transpires in the *Wachovia* case that presents the identical question.

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No. 04-989

IN THE

Supreme Court of the United States

SARAH JENKINS HORTON, ET AL.,

Petitioners,

v.

BANK ONE, N.A. ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF AMERICAN BANKERS ASSOCIATION AS *AMICUS CURIAE* SUPPORTING PETITIONERS AND RESPONDENTS

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BRIEF OF AMERICAN BANKERS ASSOCIATION AS *AMICUS CURIAE* SUPPORTING PETITIONERS AND RESPONDENTS

INTEREST OF AMICUS CURIAE

Amicus Curiae American Bankers Association ("ABA") is the principal national trade association of the banking industry in the United States.[1] ABA has members in each of the fifty states and the District of Columbia, more than 1,000 of which are national banks. ABA member banks hold approximately 90% of the domestic assets of the banking industry in the United States. ABA frequently

[1] This brief is filed with the written consent of Petitioners and Respondents. Pursuant to Rule 37.6, counsel certifies that no counsel for any party authored this brief in whole or in part, and no person or entity, other than ABA and its members, made a monetary contribution to the preparation or submission of the brief.

appears in litigation as a party or amicus where the issues raised in a case are of widespread importance and concern to the industry. ABA is authorized to pursue its national-bank members' interests in being given access to federal courts that is equal to that provided to federal savings and loan institutions, state-chartered banks and other business corporations in general.

The issues raised in the petition urgently require this Court's review. The circuit conflict presented in this case is between the Fifth, Seventh and Ninth Circuits, which have properly recognized diversity jurisdiction for national banks,[2] and the Second and Fourth Circuits, which have adopted an approach to diversity jurisdiction that denies such jurisdiction to national banks in every state where they have retail banking offices.[3] As a result of this conflict, all ABA's national-bank members face uncertainty regarding their ability to invoke federal diversity jurisdiction in most of the state-law actions that are filed against them until this Court resolves that conflict. Accordingly, timely review and disposition of this action is warranted.

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[2] *Horton v. Bank One, N.A.*, 387 F.3d 426 (5th Cir. 2004) (Pet. App. 1a); *Firstar Bank, N.A. v. Faul*, 253 F.3d 982 (7th Cir. 2001); *American Surety Co. v. Bank of California*, 133 F.2d 160 (9th Cir. 1943).

[3] *Wachovia Bank, Nat'l Ass'n v. Schmidt*, 388 F.3d 414 (4th Cir. 2004); *World Trade Center Properties, L.L.C. v. Hartford Fire Ins. Co.*, 345 F.3d 154 (2d Cir. 2003).

REASONS WHY THE WRIT SHOULD BE GRANTED

I. THERE IS NOW A CLEAR CIRCUIT CONFLICT THAT IS HAVING AN IMMEDIATE ADVERSE IMPACT ON NATIONAL BANKS.

As explained in the petition and the brief in response, there is now a clear circuit conflict between the Fifth, Seventh and Ninth Circuits on the one hand, and the Second and Fourth Circuits on the other, as to whether a national bank is "located," for purposes of 28 U.S.C. § 1348, wherever it maintains a branch.

In *Firstar Bank, N.A. v. Faul*, 253 F.3d 982 (7th Cir. 2001), the court held that a national bank is "located," for purposes of section 1348, only at the location listed in its organizational certificate or where it has its principal place of business. *Id.* at 993. Relying on decisions of this Court and other lower courts, as well as the history of section 1348, and Congress's policies in those statutes, the Seventh Circuit rejected the argument that a national bank is "located" wherever it maintains a branch. *Id.* at 987-93. In this case, the Fifth Circuit followed the Seventh Circuit in *Firstar* and carefully explained why national banks – in order to be treated in parity with all other financial institutions – are "located" for purposes of diversity jurisdiction only in the states where they have their principal place of business or have listed in their organizational certificate. *See* Pet. App. 5a, 9a. The Ninth Circuit, in a decision discussed below, pp. 10-11, construed a predecessor statute to section 1348 to conclude that a national bank was not "located," for purposes of the statute, in states where it only maintains branches. *American Surety Co. v. Bank of California*, 133 F.2d 160, 161-62 (9th Cir. 1943).

By contrast, the Fourth Circuit, in *Wachovia Bank, Nat'l Ass'n v. Schmidt*, 388 F.3d 414, 416 (4th Cir. 2004),

held that a national bank is "located," for purposes of section 1348, wherever it maintains a branch office, expressly rejecting the reasoning of the Seventh and Fifth Circuits, *id.* at 417-18. Because of multiple recusals, the Fourth Circuit denied en banc review of its decision even though six of the nine non-recused active judges favored such review. *See Wachovia, Nat'l Ass'n v. Schmidt*, No. 03-2061 (4th Cir.), Order of Feb. 10, 2005. The Second Circuit earlier came to the same conclusion as the Fourth Circuit, although with no explanation for its holding. *See World Trade Center Properties, L.L.C. v. Hartford Fire Ins. Co.*, 345 F.3d 154, 161 (2d Cir. 2003). Accordingly, there is now a complete and acknowledged conflict between the circuits on an important issue of federal law that warrants review by this Court.

The *Wachovia* ruling has already had, and will continue to have, a dramatic effect on the cases now pending in the federal courts in the Fourth Circuit. Since the Fourth Circuit issued its ruling, at least five pending actions have been remanded to state court.[4] The decision potentially may

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[4] *See, e.g., Wachovia*, 388 F.3d 414; *Coots v. Wachovia Securities, Inc.*, 114 Fed. Appx. 586 (4th Cir. Dec. 10, 2004); *National Union Fire Ins. Co. v. Manufacturers and Traders Trust Co.*, No. 03-2276 (4th Cir.) (Order of Jan. 28, 2005, dismissing First Union, N.A. as a dispensable, non-diverse party); *Friel Prosthetics, Inc. v. Bank of America, Nat'l Ass'n*, No. DKC 2004-3481 (D. Md. Feb. 9, 2005); *Stewart v. Bank of America, Nat'l Ass'n*, No. DKC 2004-2482 (D. Md. Feb. 9, 2005).

If the Court adopts the majority view that national banks are not "located," for purposes of section 1348, wherever they maintain a branch, then the parties to these and the other cases that will subsequently be remanded to state court will be deprived of a federal forum and will face increased litigation expenses and delay as a result of an ultimately correct, but nevertheless unsuccessful, removal effort. *See also infra* p. 6 (discussing 28 U.S.C. § 1447(c) & (d)).

also affect actions now pending in federal courts in other circuits, left uncertain by the multi-circuit conflict.

ABA national-bank members are adversely impacted by the continuation of the circuit conflict and the uncertainty it generates. For example, according to the FDIC's website (fdic.gov), member banks Bank of America, N.A., U.S. Bank, N.A., and Wells Fargo Bank, N.A. each maintain branches in more than 20 states, JPMorgan Chase, N.A. has branches in 17 states, Wachovia has branches in 13 states, and Keybank, N.A. has branches in 12 states. These and other national banks with multi-state branches are most likely to confront claims by disgruntled customers, suits on obligations and activities, and civil actions by and against insurers, in the states where they maintain branches. Under the Second and Fourth Circuits' view, these banks would not be permitted diversity jurisdiction access to federal courts in *any* state where they have a retail banking office.

By contrast, large interstate state banks like SouthTrust, Comerica and Compass Bank, to name just three, do not face a similar disadvantage.[5] For these banks' interstate branches, diversity jurisdiction would be governed by 28 U.S.C. § 1332(c)(1). For the purposes of establishing the citizenship of a corporation, that statute provides that "a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business...." As defendants, state banks could (assuming the requisite amount in controversy) establish federal diversity jurisdiction for purposes of removal in all of the states in which they do business, except where they are chartered or have their principal place of

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[5] According to the FDIC's website, fdic.gov, SouthTrust maintains branches in 9 states, while Comerica and Compass both maintain branches in at least 6 states.

business. As recognized by the Fifth Circuit in this case, this easily-demonstrated disparity "would lead to a narrow concept of 'parity'" between national and state charters with respect to access to federal courts directly contrary to the longstanding purposes of the National Bank Act that this Court has recognized. Pet. App. 13a. *See also infra* pp. 7-8.

Further, while the circuit conflict is unresolved, district courts may hesitate to invest time conducting extensive litigation proceedings in diversity actions involving national banks with branches in the jurisdiction. Indeed, such uncertainty could even lead district judges to remand actions to state court. *See* 28 U.S.C. § 1447(c) ("If at any time before final judgment it *appears* that the district court lacks subject-matter jurisdiction, the case *shall be* remanded.") (emphasis added). And such remands cannot be appealed. *See id.* § 1447(d). This Court's prompt resolution of the issue presented in the petition is needed to provide jurisdictional certainty as to the many cases pending in, or yet to be filed or removed to, the lower federal courts. Prompt clarification in the law will allow both national banks and other litigants to plan for and conduct litigation under the correct understanding of diversity jurisdiction principles.

II. CONGRESS INTENDED NATIONAL BANKS TO BE ACCORDED THE SAME ACCESS TO FEDERAL COURTS AS OTHER STATE-CHARTERED CORPORATIONS AND BANKS.

A. Equal Access To Federal Court Is A Fundamental Part Of The National Banking Charter.

For more than a century, one of the fundamental tenets involving the statutory rights accorded by Congress to national banks is that these federally chartered institutions would be granted at least the same right of access to federal district court as are accorded to other state-charted corporations, and in particular, as other state-chartered banks.

Under the Second and Fourth Circuits' holdings, banks are to be deemed citizens of every state in which they have branches. By comparison, federal savings and loan institutions, state banks, and all other financial institutions with branches outside their chartering state are deemed to be citizens of at most two states. *See* 28 U.S.C. § 1332(c)(1). This Court should now decide whether banks chartered pursuant to the National Bank Act – uniquely among other business entities in this nation – cannot establish federal diversity jurisdiction in any state in which they have even a single retail banking office.

B. This Court Has Recognized The "Special Nature" Of National Banks.

This Court has long "recognized the special nature of federally chartered banks." *Beneficial National Bank v. Anderson*, 539 U.S. 1, 10 (2003). Not long after the National Bank Act was adopted in the early 1860s, this Court, in construing another provision of the Act, opined that "[n]ational banks have been [n]ational favorites." *Tiffany v. National Bank of Mo.*, 85 U.S. 409, 413 (1873). In doing so, the Court elaborated that:

> "[national banks] were established for the purpose, in part, of providing a currency for the whole country, and in part to create a market for the loans of the General government. It could not have been intended, therefore, to expose them to the hazard of unfriendly legislation by the States, or to ruinous competition with State banks. On the contrary, much has been done to insure their taking the place of State banks."

Id.

More recently, this Court has followed these early observations regarding the unique status that Congress accorded national banks in applying the National Bank Act. For example, this Court held that "[u]niform rules limiting the liability of national banks and prescribing exclusive remedies for their overcharges are an integral part of a banking system that needed protection from possible unfriendly State legislation." *Beneficial*, 539 U.S. at 10 (internal citation and quotation marks omitted). Therefore, the Court found that the National Bank Act provides "the requisite pre-emptive force to provide removal jurisdiction" to federal court for usury claims against national banks. *Id.* at 11.[6]

This Court's review of this case to resolve the circuit conflict is warranted because the Second and Fourth Circuits' decisions are at odds with this Court's understanding of the "special nature" of national banks.

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[6] Similarly showing national banks' special status, in *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 32 (1996), this Court held that the normal rule that courts should apply a "presumption against preemption" is reversed in National Bank Act cases:

> "In using the word 'powers,' the [National Bank Act] chooses a legal concept that, in the context of national bank legislation has a history. That history is one of interpreting grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law."

C. Resolution Of The Circuit Conflict Is Necessary To Restore The Well-Settled Understanding That National Banks Should Not Be Uniquely Disadvantaged In Their Access To Federal Courts.

Given the special role played by national banks, when Congress first authorized them in 1863, it extended the jurisdiction of the federal courts to include *all* suits involving a national bank. *See* Act of Feb. 25, 1863, ch. 58, 12 Stat. 665, 681. "For the first couple [of] decades of their existence, any suit involving a national bank could be brought in or removed to federal court since national banks are creatures of federal law and thus any suit by or against them was a suit arising under federal law." *Firstar Bank*, 253 F.3d at 986, citing *Petri v. Commercial Nat'l Bank of Chicago*, 142 U.S. 644, 648 (1892); *Horton*, 387 F.3d at 430 (same), Pet. App. 6a.

In 1882, Congress eliminated automatic federal question jurisdiction over all disputes involving national banks. *See Leather Mfrs.' Nat'l Bank v. Cooper*, 120 U.S. 778, 780-81 (1887). In doing so, however, it expressly provided that jurisdiction over lawsuits involving national banks "shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States...." Act of July 12, 1882, ch. 290, 22 Stat. 162, 163.

This Court promptly construed the 1882 amendment to place "national banks on the same footing as the banks of the state where they were located for all the purposes of the jurisdiction of the courts of the United States." *Leather Mfrs.' Nat'l Bank*, 120 U.S. at 780; *see also Petri*, 142 U.S. at 649 (observing that 1882 amendment "placed [national banks] in the same category with banks not organized under the laws of the United States"); *Firstar Bank*, 253 F.3d at 986; *Horton*, 387 F.3d at 430, Pet. App. 7a-8a.

In 1887, Congress again revised the jurisdictional statute, introducing the language at issue in this case. *See* Act of Mar. 3, 1887, ch. 373, 24 Stat. 552, 554 (providing that "all national banking associations ... shall ... be deemed citizens of the States in which they are respectively located"). When interpreting this statutory revision, this Court again recognized the clear intent of Congress that national banks be accorded equal access to the federal courts. *See Petri*, 142 U.S. at 650-51 ("No reason is perceived why it should be held that congress intended that national banks should not resort to federal tribunals as other corporations and individual citizens might."); *Horton*, 387 F.3d at 432-33, Pet. App. 11a; *Fin. Software Sys., Inc. v. First Union Nat'l Bank*, 84 F. Supp. 2d 594, 600 (E.D. Pa. 1999) (recognizing that the 1887 Act changed the structure of the 1882 enactment, but it "did not change the purpose").

Indeed, the 1887 Act expressly stated that Congress intended to put national banks on at least as good a footing as individuals and state-chartered institutions with respect to access to federal courts: "[I]n such cases [involving national banks,] the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same State." Act of Mar. 3, 1887, ch. 373, 24 Stat. 552, 554-55.

In 1911, Congress dropped the language just quoted and adopted language nearly identical to the current section 1348: "[A]ll national banking associations established under the laws of the United States shall, for the purposes of all other actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located." Act of Mar. 3, 1911, ch. 231, § 24, ¶ 16, 36 Stat. 1087, 1092-93.

At the time, most national banks – like state banks – had offices in only one state. However, some had established interstate branches. One of those banks, the Bank of

California, had branches in Oregon in addition to its main office in California. In a diversity action brought against the bank in Oregon, the Ninth Circuit affirmed the district court's conclusion that

> "a logical interpretation of the phraseology of [the 1911 Act language] leads to the conclusion that the 'States in which they (national banking associations) are respectively located' are those states in which their principal places of business are maintained. If the Congress had intended to provide that a national banking institution be given the privilege and should carry the duties of citizenship in various states upon the basis of branch business offices being established therein, it would be a noteworthy departure from the general rule, and more likely than not Congress would have plainly state[d] such intent."

American Surety Co. v. Bank of California, 133 F.2d 160, 162 (9th Cir. 1943).

Congress responded to this authoritative judicial construction of the "located" language – and call for a "plain statement" from Congress if the rule was intended to be otherwise – five years later, in 1948. At that time, the national bank jurisdictional statute was re-codified as the present 28 U.S.C. § 1348, and Congress left intact the provision of the statute relied upon by the Ninth Circuit deeming national banks to be "citizens of the States in which they are respectively located" – *i.e.*, the state of their principal place of business.

When Congress amended the National Bank Act in the 1994 Reigle-Neal Act, Pub. L. No. 103-328, Title I, 108 Stat. 2338, 2349, 2352, which relaxed prior barriers to interstate branching by both national and state banks, *see id.* (amending, *inter alia*, 12 U.S.C. §§ 36 & 1842(d)), and made it possible for all national banks to have branches nationwide, it again left in place the same statutory language of section 1348, backed up by the same settled judicial construction regarding the citizenship of a national bank.

After Congress's adoption of Reigle-Neal in 1994, the pace of national and state banks' interstate branching activities increased dramatically. National banks now have over 16,000 interstate branches, while state banks have slightly less than 6,000 interstate branches.[7]

A statute's longstanding meaning forms the background against which Congress legislates when it amends the law. Courts presume that Congress will use clear language if it intends to alter an established understanding about what a law means: if Congress fails to do so, courts presume that the new statute has the same effect as the older version. *Firstar Bank*, 253 F.3d at 988, citing *Cottage Savings Association v. Commissioner*, 499 U.S. 554, 562 (1991). Moreover, if a phrase or section of a law is clarified through judicial construction, and the law is amended, but retains that same phrase or section, then Congress presumably intended for the language in the new law to have the same meaning as the old. *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998); *Lorillard v. Pons*, 434 U.S. 575, 581 (1978); *Firstar Bank*, 253 F.3d at 988.

Applying these interpretive principles here, Congress recodified section 1348 in 1948 in light of the settled

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[7] *See* http://csbs.org/info_stats/StateBankingStats.pdf (p.11) (Sept. 31, 2003).

interpretation and operation of the statute which had recently been reaffirmed by the Ninth Circuit's 1943 *American Surety* decision discussed above, pp. 10-11. The settled understanding that Congress adopted in 1948 was that the 1882 amendments to the National Bank Act, as carried over in the 1887 and 1911 Acts, placed national banks in the same position regarding federal jurisdiction as all other corporations. *Petri*, 142 U.S. at 650-51; *Leather Mfrs.' National Bank*, 120 U.S. at 780. *See Mercantile National Bank v. Langdeau*, 371 U.S. 555, 565-66 (1963) ("Section 4 [of the 1882 and 1887 amendments] apparently sought to limit, with exceptions, the access of national banks to, and their suability in, the federal courts to the same extent to which non-national banks are so limited."). After 1994, when interstate branching by national banks became widespread, Congress maintained this longstanding legal institution of parity between state and national banks with respect to federal court jurisdiction.

Because the Second and Fourth Circuits' decisions upset this well-settled understanding of section 1348 – and in the process create uncertainty regarding national banks' access to federal courts – this Court's prompt resolution of the circuit conflict is warranted.

III. THIS COURT SHOULD GRANT REVIEW BECAUSE THE SECOND AND FOURTH CIRCUITS' DECISIONS ARE INCONSISTENT WITH THE NATIONAL BANK ACT.

The National Bank Act provides for the formation of national banking associations. Organizers adopt articles of association, 12 U.S.C. § 21, and create an "organization certificate," 12 U.S.C. § 22, which is sent to the chartering authority, the Office of the Comptroller of the Currency.

The organization certificate must identify the physical location of the association. The certificate shall "specifically state" the "place where its operations of discount and deposit

are to be carried on, designating the State, Territory, or district, and the particular county and city, town, or village." 12 U.S.C. § 22(Second). Clearly, under section 22(Second), a "national association" is deemed to have one "location." *See also Firstar Bank*, 253 F.3d at 993-94 (discussing § 22(Second)). By concluding that national banks are "located" wherever they maintain a branch, the Second and Fourth Circuits' decisions conflict with 12 U.S.C. § 22(Second).

The Second and Fourth Circuits' decisions also overlook the fact that a "national banking association" has a legal existence that is distinct and separate from its branches. Congress dealt with the mechanism for establishing and situating branches in an entirely different fashion in the National Bank Act. *See* 12 U.S.C. § 36. The authority for a national association to create branches is separate and apart from the provisions relating to the creation of the bank itself as a national association.[8]

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[8] Congress's distinction between a national association, referred to in statutes like 12 U.S.C. § 22(Second) and 28 U.S.C. § 1348, as opposed to national bank "branches," is also reflected in 12 U.S.C. § 36(f)(2): "All laws of a host State, other than the laws regarding community reinvestment, consumer protection, fair lending, establishment of intrastate branches, and the application or administration of any tax or method of taxation, shall apply to a branch (in such State) of an out-of-State national bank to the same extent as such laws would apply if the branch were a national bank the main office of which is in such State."

Congress's direction that a "branch" shall receive the same treatment as a "national bank" under the laws of the host state is significant because it provides further congressional recognition that a "national bank" and its branches are not coextensive, and represent separate and distinct legal entities for purposes of the National Bank Act and therefore also the jurisdictional statute. If a "national bank" and a "branch" were in fact legally indistinguishable from one another, then 12 U.S.C. § 36(f)(2) would be mere surplussage.

Accordingly, this Court should grant review to harmonize the provisions of the National Bank Act with the jurisdictional provision in section 1348, in light of the conflicting decisions of the circuit courts.

CONCLUSION

For the foregoing reasons, as well as for those set forth in the petition and the brief in response, the petition should be granted.

Respectfully submitted,

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF WACHOVIA BANK, NATIONAL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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QUESTION PRESENTED

Amicus will address the question whether the Court should consider the petition for a writ of certiorari in this case along with the forthcoming petition in *Wachovia Bank, N.A.* v. *Schmidt*, 388 F.3d 414 (4th Cir. 2004).

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INTEREST OF THE *AMICUS CURIAE*

Amicus Wachovia Bank, National Association ("Wachovia") is a national banking association with its main office in Charlotte, North Carolina.[1] Wachovia operates branches in a number of other states, including South Carolina. In *Wachovia Bank, N.A.* v. *Schmidt*, 388 F.3d 414 (4th Cir. 2004), Wachovia filed a petition in the United States District Court for the District of South Carolina seeking an order to compel arbitration of a dispute with citizens of South Carolina. On appeal after denial of the petition, the Fourth Circuit ruled that, under 28 U.S.C. § 1348, national banks must be treated as citizens of *all* states in which they have branches. That court accordingly held that both Wachovia and the *Wachovia Bank* plaintiffs are citizens of South Carolina and that, as a result, the federal courts lack diversity jurisdiction to entertain the *Wachovia Bank* suit.

The question addressed in *Wachovia Bank* and in this case – whether national banks should be treated as citizens of all states in which they maintain a branch – is one of great practical importance to *amicus*. The resolution of that question will affect a substantial volume of litigation in which national banks like Wachovia engage. And, as Judge King observed while dissenting from denial of rehearing en banc in *Wachovia Bank*, the Fourth Circuit's rule will have substantial "disruptive consequences" for national banks by excluding them from federal court whenever they have a branch in the forum state. *Wachovia Bank, N.A.* v. *Schmidt*, No. 03-

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief *amicus curiae*. Their letters of consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party has authored this brief in whole or in part, and no person or entity, other than *amicus* or its counsel, has made a monetary contribution to the preparation or submission of this brief.

2061 (Jan. 28, 2005), slip op. 6 (King, J., dissenting from denial of rehearing en banc). *Amicus* accordingly has a significant interest in the proper disposition of this petition, and of the petition for certiorari that Wachovia will soon file in *Wachovia Bank*. *Amicus* therefore submits this brief to assist the Court in the resolution of this petition.

ARGUMENT

The question presented by the petitioner in this case is whether, under 28 U.S.C. § 1348, a national bank should be treated for purposes of diversity jurisdiction as a citizen of *every* state in which it maintains a branch or, instead, as a citizen only of the state listed in its organizational certificate and articles of association or in which it has its *principal* place of business. *Amicus* Wachovia believes that this issue is an extremely significant one that should be resolved by this Court. The broader citizenship rule enunciated by the Fourth Circuit in *Wachovia Bank* will encourage forum shopping, while denying national banks competitive equality with state banks that are not governed by section 1348. For these reasons, the Comptroller of the Currency urged the Fourth Circuit to grant en banc review in *Wachovia Bank*, noting that the issue presented is one "of exceptional importance." No. 03-2061, Br. Amicus Curiae of the Office of the Comptroller of the Currency in Support of Plaintiff Wachovia Bank, N.A.'s Petition for Rehearing and Request for Rehearing En Banc, at 1. Wachovia will soon file a petition for a writ of certiorari in *Wachovia Bank*, which this Court may wish to consider along with the petition in this case.

1. In the present case, the Fifth Circuit concluded that the language of section 1348 is ambiguous; looking to the history and purpose of the statute, the court held that a national bank should be treated as a citizen only of the state in which it has its principal place of business and/or the state that is listed in its organizational certificate and articles of association. Pet.

App. 5a-19a. Less than a month later, however, the Fourth Circuit reached the contrary conclusion, holding in *Wachovia Bank* that a national bank is a citizen of every state in which it operates branches. *Wachovia Bank*, 388 F.3d at 416-440. In doing so, the Fourth Circuit expressly rejected the holding of the Fifth Circuit in this case and of the Seventh Circuit in *Firstar Bank* v. *Faul*, 253 F.2d 982 (7th Cir. 2001). Judge Luttig's opinion for the Fourth Circuit addressed the views of the disagreeing circuits and assessed the statutory language, history, and case law. Judge King responded with a lengthy and well-reasoned dissent. *Wachovia Bank*, 388 F.3d at 432-440 (King, J., dissenting).

When Wachovia sought rehearing en banc by the Fourth Circuit, a substantial majority of the participating judges *favored* the petition: six voted for rehearing, while only three voted against, with the remaining four recusing themselves. In this unusual circumstance, rehearing was denied because a majority of judges "in regular active service" did not support the petition. Fed. R. App. P. 35(a). See Fourth Cir. Local R. 35(b). This result prompted Judge King to issue a renewed dissent, in which he described the importance of the issue and emphasized the aberrant nature of the Fourth Circuit's decision. *Wachovia Bank, N.A.* v. *Schmidt*, No. 03-2061 (Jan. 28, 2005), slip op. 3-6 (King, J., dissenting from denial of rehearing en banc).

2. Against this background, *amicus* believes that the Court should resolve the issue presented here by granting review in *Wachovia Bank* or in this case, or by granting both petitions and consolidating the cases. The Court accordingly may wish to defer resolution of the petition in the present case pending the filing of the forthcoming petition for certiorari in *Wachovia Bank*. Having cases representing both sides of the conflict before the Court would permit the fullest presentation of the issues. We note that the Office of the Comptroller of the Currency has participated in both cases; it

submitted briefs supporting Bank One on the merits before the Fifth Circuit and supporting Wachovia's petition for rehearing before the Fourth Circuit.

Moreover, postponing resolution of the petition in this case so that it may be considered along with the petition in *Wachovia Bank* would not materially delay the resolution of this case. Although the petition in *Wachovia Bank* is not due until April 29, Wachovia will file its petition by no later than March 4. That will assure that the petitions in both cases could be resolved prior to the Court's recess this summer.

For the foregoing reasons, the Court should defer resolution of the petition in this case pending the filing of the forthcoming petition for certiorari arising out of *Wachovia Bank, N.A.* v. *Schmidt*, 388 F.3d 414 (4th Cir. 2004).

Respectfully submitted.

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